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LAW REFORM NUMBER

The *Modern Law Review* has always considered the publication of suggestions for the reforming of our laws as very much among its objectives. We have accordingly from time to time published articles and notes on such matters as the improvement of our company law, of our criminal law, of our family law (in a number of different aspects), and of other branches of our jurisprudence. When therefore Messrs. Stevens & Sons Limited most generously offered to publish for us a double number as part of their celebrations of their one hundred and fiftieth birthday, the Editorial Committee felt that this would provide an excellent occasion for a general survey of the whole field of law reform.

On consideration, however, we thought that it would be more useful and more manageable to confine our attention to the area in which the Law Revision Committee operates. Specific topics such as family law and company law have been or are under consideration by expert committees or commissions: indeed in some cases, as with the Morton Commission, their proposals have been subjected to detailed discussion in our pages, and have already been largely implemented by legislation. And now of course a special Committee on the reform of the criminal law has been set up.

On the other hand we felt that insufficient attention had been given to the technical problems involved in the mechanics of statutory law reform. The experience resulting from the proposals of the Law Revision Committee of pre-war years has not been altogether satisfactory, and this has possibly influenced the present Committee to take up an excessively cautious position. We decided accordingly to preface our series of individual attacks on the problems of reform by a survey of past experience in this field, and by an analysis of the drafting difficulties actually involved. In the result the present number will be found to contain articles on the historical development of the present situation, on the problem of drafting, on property law and equity, on contract (including quasi-contract) and tort, and on evidence.

The Editorial Committee wish to express their deep gratitude

to those busy teachers and practitioners who have shouldered the burden of making the necessary analyses of the existing law and formulating proposals for reform. Policy has been left entirely to the individual discretion of the authors who have for the most part chosen to concentrate on a small number of desirable reforms which they consider should be effected in the near future, rather than to make detailed suggestions covering the whole field of their study. Later on we may return to the attack on other sectors of the front. Finally, we must also express our warm appreciation to Messrs. Stevens & Sons Ltd. for having made the publication of this series of studies possible.

C.

THE MACHINERY OF LAW REFORM

THE occasion of the appearance of a series of articles advocating reform in some of the more substantial branches of private law offers an opportunity of reviewing the existing machinery of law reform. There are two standing committees for England and Wales for this purpose appointed by the Lord Chancellor. They are the Law Reform Committee, appointed by Lord Simonds in 1952, and the Private International Law Committee, which also dates from Lord Simonds' Chancellorship. Scotland has its own Law Reform Committee, which was first appointed by the Lord Advocate at the end of 1954. In the field of criminal law, which is outside the scope of this article, the Home Secretary's standing committee—the Criminal Law Revision Committee—was not appointed until early 1959.

The terms of reference which were given to the Law Reform Committee are "to consider, having regard especially to judicial decisions, what changes are desirable in such legal doctrines as the Lord Chancellor may from time to time refer to the Committee." These terms have an academic flavour with emphasis upon the doctrine of judicial precedent. They are slightly more restrictive than those given to the Law Revision Committee which sat from 1934 until after the outbreak of the Second World War. That Committee was asked to pay regard to statute law as well as judicial decisions. But in practice, as will be seen, by reference to the subjects referred to each Committee there has been little difference in the type of subject considered, save that the first Committee revised the Statutes of Limitation, whereas no comparable assault upon obsolete statute law has been entrusted to the Law Reform Committee. In order to assist comparison there are set out at the end of this article details of the composition and achievements of both of these Committees.¹

In practice the Law Reform Committee, of which Lord Jenkins has been chairman since its institution, has been given a fairly free hand in the choice of subjects which have been referred to it. But there are somewhat severe limitations on the scope of its activities. Broadly speaking, it is left to the government departments, other than the Lord Chancellor's office, to decide whether or not those parts of the Statute Book which regulate the numerous functions of government shall be revised. When a decision in favour of reform has been taken, it is not to the Law Reform Committee but to an expert *ad hoc* committee, appointed by the appropriate Minister, that the matter is referred. Occasionally

¹ Annex, pp. 1-4.

where the importance of the subject-matter justifies it, a Royal Commission takes the place of the departmental committee. Nor does the Lord Chancellor himself hesitate to refer a matter to an *ad hoc* committee either on the ground of urgency or, more usually, where the services of persons specially skilled in a particular branch of the law can be utilised. A list of a large number of *ad hoc* commissions and committees which have sat since the end of the Second World War is given as a second annex to this article. It is by no means complete, but nevertheless records the appointment of forty-five bodies.

The work of the Law Reform Committee, as well as that of the majority of the *ad hoc* committees, is supported by non-governmental bodies. The Council of the Law Society and more recently the General Council of the Bar conduct their own investigations into the need for law reform. These professional bodies have of late been joined by "Justice," the British section of the International Commission of Jurists. The Law Society and the Bar Council are perhaps more ready to express their opinion at the invitation of the Law Reform Committee than to put forward topics to the Lord Chancellor for reference to that Committee or an *ad hoc* committee. "Justice" is more ready to take the initiative, particularly where the law is suspected of being unduly oppressive to the enjoyment of human rights. Another recent development has been undertaken on behalf of the political associations within the Inns of Court in the promotion of particular reforms. The Haldane Society in the past, the Inns of Court Conservative and Unionist Association and the Society of Labour Lawyers at the present time, have sponsored various proposals for reform, generally in a concrete form. From the foregoing it will be seen that, while there may be some reason for criticism of the lack of organisation and co-ordination among the bodies interested in law reform, there is no lack of sources of proposals. The question of how proposals may be implemented by legislation is a different matter which will be considered later.

It is often said that there is a difference between the approach to reform of what is called "lawyers' law," as contrasted with administrators' (or politicians') law. This distinction is in some ways false. For example, few would deny that company law is properly classified under the heading "lawyers' law," yet the administration of company law is the concern of the Board of Trade and its working and alleged defects are constantly canvassed in Parliament. Again, the establishment of the Restrictive Practices Court has given to lawyers a new field of activity where there is ample scope for doctrinal differences. Yet the object of the establishment of such a court was primarily a matter of political interest. Nevertheless the examination of judicial decisions with a view to considering what changes are desirable in legal doctrines which have been moulded by the courts does not by and large attract the interest of civil servants or Members of Parliament.

It is lawyers and those of their clients particularly affected who resent a decision of the courts to such an extent that they are prepared to canvass a reform of the law. In practice the suggestions of subjects for reference to the Law Reform Committee from this source are not numerous. Even when a public announcement has been made of an actual reference to the Committee, accompanied by an invitation to give written or oral evidence, the response is meagre. Occasionally vested interests are suspicious of change and offer evidence in support of the *status quo*. Evidence from external sources in favour of reform is seldom forthcoming. Such a situation places the Law Reform Committee in a dilemma. Aware though members may be of the criticisms of a recent decision of the Court of Appeal or the House of Lords which demonstrates to the trained lawyer a case of real hardship arising from the rigidity of the judicial precedent, it is not easy to find a solution to the problem in terms suitable for enactment by Parliament, in the absence of a clear, general demand for a change in the law.

In the course of rather more than eight years this Committee has been able to agree on a number of not unimportant changes, including two of considerable interest to the general public. In passing it may be of interest to say something of the method of approach of the Committee. On receiving the approval of the Lord Chancellor of a subject for examination, the matter is referred to a sub-committee of five or six members under the chairmanship of a judge. The membership normally includes both a solicitor and an academic lawyer. It is this sub-committee which receives and examines any evidence which may be forthcoming from outside sources. Sometimes it asks the Lord Chancellor for permission to co-opt another lawyer with special experience in the particular field to assist. In practice this specialist is generally an academic lawyer. After an interval of several months the sub-committee draws up a report to the main Committee, where the proposals of the sub-committee are liable to be re-examined with some thoroughness. The long interval between the reference and the report is mainly due to the excessive time which organisations wishing to tender evidence require before they can present their views, which they usually do by written memoranda. Only on one occasion so far has the Committee failed to agree upon what course of action should be recommended. In one or two other cases a dissentient voice or two has been recorded.

The two subjects of considerable substance of public interest are occupiers' liability and the rule against perpetuities. As to the latter, perhaps even property owners are unaware of the hardships that may be suffered under the existing law; at all events nothing has been done to implement the considerable changes in the law which the Committee recommended. On the other hand, the changes in the law relating to occupiers' liability have been accepted by Parliament. The incongruity and complexity of the

distinction between invitees and licensees has as a result disappeared from our law in cases arising after 1957.

Other matters which have been examined by the Committee relate to the evidentiary requirement of the Statute of Frauds and the Sale of Goods Act, innkeepers' liability, conditions and exceptions in insurance policies, variation of trusts and the sealing of contracts by corporations other than those incorporated under the Companies Act, 1948. It was as to the effect of tax liability on the amount of damages for personal injury that the Committee failed to make any positive recommendation for a change. With the exception of the first of these topics, which had already been the subject of recommendations by the Law Revision Committee before the last war, all the subjects, except the rule against perpetuities, were suggested by very recent decisions of the courts. In some cases the comments of the presiding judge had drawn attention to the state of the law. The only subject which could be said to have arisen from strong professional pressure was the variation of trusts, where the eminent Institute of Conveyancers, and indeed Chancery practitioners as a whole, were fully cognisant of the hardships caused by the all too limited powers of the Chancery judges to sanction departure from the strict terms of a trust.

Only one subject has met with serious resistance from outside. The Committee had little difficulty in agreeing that the law with regard to conditions and exceptions in insurance policies was theoretically defective in certain respects. They became aware, however, of strong resistance to change on the part of insurers. It is common knowledge that the integrity of British insurance is respected throughout the world and it would have been damaging to a profession which contributes so much to the economic stability of the country if the exposure of theoretical defects had been accompanied by recommendations for their amendment. Just as in the constitutional sphere, convention is sometimes stronger than law and even contradicts the law, so the Committee came to the conclusion not to make any positive recommendation for an amendment of the law. As lawyers they saw no difficulty in proposing an amendment, nevertheless they found no practical need for it.² The conclusion of the Committee on this subject suggests a reason why the very large number of proposals for law reform which are put forward by academic lawyers and political organisations, usually from different motives, do not result in any action. Judges and practitioners who have become accustomed to the administration of the law as they know it will not readily be persuaded to introduce a change for the sake of change. They must first be persuaded from practical experience of others that there is a need for the alteration. Public opinion nowadays is represented so much by specialised organisations. They in their turn are apt to hold

² Fifth Report of the Law Reform Committee (1957) Cmnd. 62.

conservative rather than radical views on matters to which their expertise relates, as in the case of the insurance interests which would have been affected by positive changes in insurance law. It is not, therefore, surprising to find so little achieved by those law reforming agencies whose activities are restricted to examining lawyers' law. Again, a superficially strong case for amendment may fail to carry conviction when the underlying circumstances are examined. It may, for example, be found that the risks involved by perpetuating the existing liability have long been minimised by insurance at very small cost to the public. In such a situation, unless, as in the case of the innkeeper's former liability for his guests' motor-cars, it is found that insurers are in practice taking premiums from different persons for a single risk, it may be expedient to let the law be. In passing, it is interesting to notice from experience of membership of the Committee how deeply ingrained the habit of insurance seems to be in the English business community. Indeed, it is not an exaggeration to say that the case for and against a change in the law to some extent depends on the incidence of insurance.

Another factor which makes lawyers hesitate to recommend radical change is the knowledge that such change can only be achieved by legislation. The law as contained in a long series of precedents is understood by judge and practitioner who naturally shrink from the uncertainties of starting again to interpret legislation. Nor is it any answer that such legislation purports to enact their own recommendations. Drafting is an intricate matter calling for high expertise for which legal training and practice alone are not sufficient qualifications. Even if the drafting perfectly meets the recommendations of the committee of lawyers, there is no guarantee that Parliament may not insert amendments which may have the effect of increasing uncertainty. In any case, our courts are debarred by their own practice from comparing a report of the Law Reform Committee with the statute which purports to give its recommendations legal effect. The certainty which is the principal characteristic of a rule of law about which men are agreed may be preferable, even if it creates certain hardship in a few cases, to the uncertainty which is a frequent, though by no means inevitable, consequence of changing the law by legislation.

There are, moreover, practical difficulties in the way of any great volume of law reform Bills. This is not merely a question of finding parliamentary time to pass even an agreed enactment. The financial consequences may also be relevant. A technical issue such as the effect of tax liability on damages may prove unexpectedly controversial or may even conflict with existing government policy particularly in the spending field. Even so, it is regrettable to have to record that in only one case has a Bill giving effect to the recommendations of the Law Reform Committee been introduced by the Lord Chancellor: the Occupiers' Liability

Bill. In only one other case does government time seem to have been promised in advance—Variation of Trusts Bill. The other measures which have reached the Statute Book as a result of the Committee's recommendations owe their passage into law to the initiative of private Members of one or other House of Parliament. If successive governments think it worth while to maintain permanent machinery for law amendment it is surely their duty to ensure that those recommendations, unless wholly unacceptable, should be considered by Parliament. At present the most that can be expected is that the Bill may be drafted by parliamentary counsel. One suspects that the "usual channels," like those who serve on the Legislation Committee of the Cabinet, find lawyers' law too repulsive to merit an allocation of parliamentary time. A glance at the second annex of this article shows, however, that not all the work of the *ad hoc* committees has failed to secure adoption by the legislature.

For the removal of anomalies and the pruning of dead wood the Law Reform Committee may claim to have justified their existence, though no doubt there will always be critics to suggest further anomalies and to advocate more drastic pruning. Those who plead for an imaginative development of new rules are naturally disappointed with the results. Topics like unincorporated associations, vicarious liability, the doctrine of consideration call for re-examination. But a committee which by force of circumstances can only hope to meet at infrequent intervals could not undertake such a development unless it could rely on a thorough preview of each subject and of the field as a whole. This would have to be the task of a much smaller body, preferably of varying composition (in part) so as to ensure expert knowledge in each field of study.

It has long been the common experience of law reformers in England that authority pays little or no attention to the law of other countries, and in particular that of those members of the Commonwealth whose legal systems derive from the common law of England. Their experience should be at least as valuable as that of the United States of America, with its complexity of some fifty state jurisdictions in addition to the federal hierarchy. A committee, like the Law Reform Committee as at present constituted, is unlikely to be able to undertake a thorough examination of the law reports throughout the Commonwealth. But those who have the leisure and inclination to undertake such a study cannot fail to be impressed with the contributions to the development of the common law which have come in particular from Canada, Australia and, not least, New Zealand. The pronouncements of the House of Lords, though strictly speaking not binding in the Commonwealth, unlike the opinions of the Judicial Committee of the Privy Council, naturally receive close attention in the common

law courts of the Commonwealth because similarity in the composition of the Bench as between the House of Lords and the Judicial Committee is so pronounced. Nor can continental experience be entirely disregarded in the development of the common law system. It is interesting to recall that, when the Law Reform Committee examined the existing liability of innkeepers which derived from very early decisions of the common law courts, the Committee received evidence of how other European countries had dealt with the problem. This has had the result of securing acceptance, largely through the agency of the Council of Europe, of the law as amended by the Hotel Proprietors Act, 1956, by more than one European state. In this way real progress has been made towards a uniformity of law throughout Western Europe. But this is an isolated instance. In contrast, the Porter Committee on the law of defamation dismissed the voluminous study of the law of libel throughout the Commonwealth and the United States which was prepared for them by Dr. Glanville Williams and the late Sir Percy Winfield respectively with a bare sentence.³

Imaginative development is not, of course, restricted to imitation of the systems of other states. The difficulty is to link up what may be called the research body with the Law Reform Committee as the effective organ to decide "what changes are desirable in legal doctrines." The method of inviting the Bar Council, the Law Society and, more recently, "Justice" to investigate a problem has only been partially successful. The latter body, though only established in the last three years, seems likely to make important contributions where an active injustice has been canvassed, particularly if it affects the political liberties of the individual. The professional organisations in the nature of things share the conservative approach of the Law Reform Committee. Bodies outside the legal profession when they interest themselves in law reform are naturally concerned with grievances relating to their particular interests rather than the development of the law as a whole.

What, then, should be the composition of the expert body which it has already been suggested could profitably be linked with the Law Reform Committee? To isolate one or two research workers in the office of the Lord Chancellor would certainly give relief to the two members of the staff of that office who have worked together for many years as secretaries to the Law Reform Committee and its sub-committees, despite the burden of many other pressing duties. The official position of such research workers would at least ensure that their efforts were not dissipated over fields where no progress could, for political reasons, be expected. On the other hand, fundamental research is best undertaken by persons entirely independent of government. There is already in the University of London an Institute of Advanced Legal Studies. A new centre for Commonwealth law is the aim of the University

³ (1948) Cmd. 7536.

of Oxford in building its new law library. The Squire Law Library at Cambridge is particularly well equipped with European legal literature. The Universities of Birmingham and Manchester (among others) have developed the study of comparative law in recent years. A small committee, with a professorial chairman free to devote much of his time to the work, on which all these universities should be represented might serve as a nucleus for a standing sub-committee which would work as part of the Law Reform Committee. It would be desirable to make it clear in the terms of appointment that members of the expert committee should be free to devote a fair part of their working time to producing studies relevant to current topics under examination by the Law Reform Committee. To ensure flexibility and a strong dilution of non-academic elements, there should be a power to co-opt members for particular studies. Co-opted members could be experts, *e.g.*, in Commonwealth law, or even persons outside the legal profession who represent interests particularly affected by a proposal for reform. It may be suggested that, had the Law Reform Committee when they were called upon to examine the incidence of taxation in assessing damages for personal injuries, been able to call upon the services of some of those who have commented on the Committee's Report, the three diverging views displayed by that Report might at least have been reduced to two!⁴ There are certain topics, particularly in the law of tort, as Dr. Glanville Williams suggests in this number, which could well form the subject of a preliminary report to the Law Reform Committee by a committee of experts free to give continuous attention to their task.

Some such device as the above would surely widen the field for development while at the same time through the link with the Law Reform Committee the more extravagant proposals of the expert could be seen in proper proportion. Moreover, such a committee would be well suited to an examination of outmoded legislation in the field of private law as well as the anomalies produced by the doctrine of judicial precedent.

E. C. S. WADE *

APPENDIX

1. STANDING COMMITTEES

Lord Chancellor's Committees on Law Reform in the civil law in general

A. Law Revision Committee appointed by Lord Sankey, January 10, 1934.

Terms of reference: "To consider how far, having regard to

⁴ In particular the valuable contributions to the discussion by Mr. J. A. Jolowicz in [1959] C.L.J. 86 and *The Listener*, June 1959.

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the statute law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions."

- B. Law Reform Committee appointed by Lord Simonds, June 16, 1952.

Terms of reference: "To consider, having regard especially to judicial decisions, what changes are desirable in such legal doctrines as the Lord Chancellor may from time to time refer to the Committee."

Original membership

- A. Six Supreme Court judges and Law Lords, three practising barristers, two solicitors (City of London), two academic lawyers, Lord Chancellor's Permanent Secretary.
- B. Five Supreme Court judges and Law Lords, four practising barristers, two solicitors (London), three academic lawyers.

Secretaries

- A. Practising barrister with academic qualifications (Fellow of All Souls) and civil service assistant.
- B. Deputy Permanent Secretary to the Lord Chancellor and legal civil servant from Lord Chancellor's Office.

Change in membership

- A. In 1939 at time of 8th (last) report, five Supreme Court judges and Law Lords, one county court judge, one practising barrister, two solicitors (City of London), five academic lawyers, Lord Chancellor's Permanent Secretary.
- B. In 1960, five Supreme Court judges and Law Lords, five practising barristers, two solicitors (London), three academic lawyers.

Output

- A. Eight reports: the first, March 1934; the last, June 1939.
- B. Eight reports: the first, March 1953; the 8th, December 1958.

Subjects

- A. (1) *Actio personalis moritur cum persona*. ((1934) Cmd. 4540.)
(2) Right to recover interest in civil proceedings. ((1934) Cmd. 4546.)
(3) Doctrine of no contribution between tortfeasors. ((1934) Cmd. 4637.)
(4) Liability of the husband for the torts of the wife and liability of a married woman in tort and contract. ((1934) Cmd. 4770.)
(5) Statute of Limitations. ((1936) Cmd. 5334.)
(6) Statute of Frauds and the doctrine of consideration. ((1937) Cmd. 5449.)

- (7) The rule in *Chandler v. Webster* (frustration). ((1939) Cmd. 6009.)
- (8) Contributory negligence. ((1939) Cmd. 6032.)
- B. (1) Statute of Frauds and Sale of Goods Act, s. 4 (see A (6)). ((1953) Cmd. 8809.)
- (2) Innkeepers' liability. ((1954) Cmd. 9161.)
- (3) Occupiers' liability. ((1954) Cmd. 9305.)
- (4) Rule against perpetuities. ((1956) Cmd. 18.)
- (5) Conditions and exceptions in insurance policies. ((1957) Cmd. 62.)
- (6) Variation of trusts. ((1957) Cmd. 310.)
- (7) Effect of tax liability on damages. ((1958) Cmd. 501.)
- (8) Sealing of contracts by corporations. ((1958) Cmd. 622.)
- (9) Remedies for innocent misrepresentation.
- (10) Liability in tort of one spouse to the other.

Resulting action

- A. (1) and (2) Law Reform (Miscellaneous Provisions) Act, 1934.
- (3) and (4) Law Reform (Married Women and Joint Tortfeasors) Act, 1935.
- (5) Limitation Act, 1939.
- (6) No action on either, but see B (1).
- (7) Law Reform (Frustrated Contracts) Act, 1943.
- (8) Law Reform (Contributory Negligence) Act, 1945.
- B. (1) Law Reform (Enforcement of Contracts) Act, 1954.
- (2) Hotel Proprietors Act, 1956.
- (3) Occupiers' Liability Act, 1957.
- (4) No action.
- (5) No action but none recommended.
- (6) Variation of Trusts Act, 1958.
- (7) No action recommended by majority.
- (8) Corporate Bodies' Contracts Act, 1960.
- (9) and (10) Reports pending.
- C. Criminal Law Revision Committee, 1959 (Home Office).
Two Reports up to October 1960. Indecency with Children Act, 1960, enacts the First Report. Suicide Bill promised on Second Report.
- D. Law Reform Committee for Scotland (Lord Advocate).
Appointed December 2, 1954.
Eight Reports up to June 1960. (Similar to English Committee on Civil Law.)
- E. Private International Law Committee, 1952 (Lord Chancellor).
Two Reports, 1954-58; two pending.

Action taken

Domicile Bills, 1958 and 1959. (Withdrawn.)

2. AD HOC COMMITTEES ⁵

Under this heading must be considered *ad hoc* committees to which specific topics have been referred either by the Lord Chancellor or a departmental Minister, as well as the more formal Royal Commissions whose recommendations have resulted in changes in the law.

<i>Royal Commissions</i>	<i>Action taken</i>
Royal Commission on Justices of the Peace, 1946-48. Report (1948) Cmd. 7463	Justices of the Peace Act, 1949.
Royal Commission on the Press, 1947-48. Report (1949) Cmd. 7700.	Press Council established. No legislation.
Royal Commission on Betting, Lotteries and Gaming, 1949-51. Report (1951) Cmd. 8190.	Betting and Gaming Act, 1960.
Royal Commission on Capital Punishment, 1949-53. Report (1953) Cmd. 8932.	Homicide Act, 1957.
Royal Commission on Marriage and Divorce, 1951-55. Report (1956) Cmd. 9678.	Maintenance Agreements Act, 1957; Matrimonial Proceedings (Children) Act, 1958; Matrimonial Causes (Property and Maintenance) Act, 1958; Divorce (Insanity and Desertion) Act, 1958; Maintenance Orders Act, 1958; Legitimacy Act, 1959; Matrimonial Causes (Magistrates' Courts) Act, 1960; Marriage (Enabling) Act, 1960. Rules of the Supreme Court and administrative action by Lord Chancellor.
Royal Commission on the Law relating to Mental Illness and Mental Deficiency, 1954-57. Report (1957) Cmnd. 169.	Mental Health Act, 1959.
Royal Commission on Common Lands. Report (1958) Cmnd. 462.	
Royal Commission on Local Government in Greater London, 1959. Report (1960) Cmnd. 1164.	

⁵ Reporting since the end of the Second World War.

*Committees**Action taken*

Committee on Law of Defamation, 1939-48 (Lord Chancellor).
Report (1948) Cmd. 7536.

Defamation Act, 1952.

Committee on Company Law Amendment, 1943-45 (Board of Trade).
Report (1945) Cmd. 6659.

Companies Acts, 1947 and 1948.

Committee on Legal Aid and Legal Advice in England and Wales, 1944-45 (Lord Chancellor).
Report (1945) Cmd. 6641.

Legal Aid and Advice Act, 1949; Legal Aid Act, 1960.

Committee on Electoral Law Reform, 1944-46 (Home Secretary and Secretary of State for Scotland).
Report (1945) Cmd. 6606.
Report (1946) Cmd. 7286.

Representation of the People Acts, 1945 and 1948.

Committee on Procedure in Matrimonial Causes (Lord Chancellor). Two Interim Reports (1946-47). Final Report 1947. Cmd. 6881. Cmd. 6945. Cmd. 7024.

Rules of the Supreme Court and administrative action by Lord Chancellor.

Committee on Alternative Remedies (Monckton Report) 1946 (Minister of National Insurance).
Report (1946) Cmd. 6860.

National Insurance (Industrial Injuries) Act, 1946.
Law Reform (Personal Injuries) Act, 1948.

Army and Air Force Courts-Martial Committee, 1946 (War Office).
Report (1949) Cmd. 7608.

Army and Air Force Acts, 1955, and Courts-Martial (Appeals) Act, 1951.

Committee on Care of Children, 1946 (Home Office).
Report (1946) Cmd. 6922.

Children Act, 1948.

Committee on County Court Procedure, 1947-49 (Lord Chancellor).
Report (1948) Cmd. 7468 (Interim).
Report (1949) Cmd. 7668.

County Court Rules and various.

Committee on Limitations of Actions (Tucker Report) 1948-49 (Lord Chancellor).
Report (1949) Cmd. 7740.

Law Reform (Limitation of Actions, etc.) Act, 1954.

Committee on Supreme Court Practice and Procedure (Lord Chancellor). Three Interim Reports 1949-52. Final Report 1953.
(1949) Cmd. 7764;

Rules of the Supreme Court and administrative action by Lord Chancellor. County Courts Act, 1955. Administration of Justice Act, 1956.

*Committees**Action taken*

(1951) Cmd. 8176;

(1952) Cmd. 8617;

(1953) Cmd. 8878.

Leasehold Committee, 1948-50 (Lord Chancellor).

Report (1949) Cmd. 7706.

Report (1950) Cmd. 7982.

Leasehold Property (Temporary Provisions) Act, 1951.

Landlord and Tenant Act, 1954.

Rent Act, 1957.

Landlord and Tenant (Temporary Provisions) Act, 1958.

Committee on Local Land Charges, 1949-52 (Lord Chancellor).

Report (1952) Cmd. 8440.

Committee on the Law and Practice relating to Charitable Trusts.

Report (1952) Cmd. 8710.

Charities Act, 1960.

Committee on the Law of Intestate Succession, 1950-51 (Lord Chancellor).

Report (1951) Cmd. 8310.

Intestates' Estates Act, 1952.

Committee on Naval Discipline Act, 1950-51 (Admiralty).

Reports (1951) Cmd. 8094, 8119. See also Cmd. 8141 and H.C. 421 of 1955-56.

Naval Discipline Act, 1957.

Copyright Committee, 1951-52 (Board of Trade).

Report (1952) Cmd. 8662.

Copyright Act, 1956.

Committee on Central Criminal Court in South Lancashire (Home Secretary). Report (1953) Cmd. 8955.

Criminal Justice Administration Act, 1956.

Committee on Departmental Records, 1952-54 (Chancellor of the Exchequer and Master of the Rolls).

Report (1954) Cmd. 9163.

Public Records Act, 1958.

Committee on Shares of No Par Value, 1952-54 (Board of Trade).

Report (1954) Cmd. 9112.

Committee on Law of Civil Liability for Damage done by Animals, 1953 (Lord Chancellor).

Report (1953) Cmd. 8746.

<i>Committees</i>	<i>Action taken</i>
Departmental Committee on Summary Trial of Minor Offences, 1954-55 (Home Office). Report (1955) Cmd. 9524.	Magistrates' Courts Act, 1957.
Committee on Adoption of Children (Hurst Committee): 1953 (Home Office and Scottish Office). Report (1954) Cmd. 9248.	Children Act, 1958, consolidated by Adoption Act, 1958.
Committee on Land Charges, 1954-56 (Lord Chancellor). Report (1956) Cmd. 9825.	
Committee on Cheque Endorsement, 1955-56 (Chancellor of the Exchequer). Report (1956) Cmnd. 3.	Cheques Act, 1957.
Committee on Homosexual Offences and Prostitution, 1954-57 (Home Office). Report (1957) Cmnd. 247.	Street Offences Act, 1959. (Prostitution only.)
Committee on Administrative Tribunals and Enquiries (Franks Committee) 1956-57 (Lord Chancellor). Report (1957) Cmnd. 218.	Tribunals and Inquiries Act, 1958, and action by Ministers.
Committee on Children and Young Persons (Ingleby Committee) 1956-60 (Home Office). Report (1960) Cmnd. 1191.	
Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment, 1957 (Board of Trade). Report (1957) Cmnd. 221.	
Committee on the Law relating to Rights of Light, 1957-58 (Lord Chancellor). Report (1958) Cmnd. 473.	Rights of Light Act, 1959.
Committee on Procedure before Examining Justices, 1957-58 (Home Office). Report (1958) Cmnd. 479.	
Committee on Consolidation of Highway Law, 1958-59 (Ministers of Housing and Local Government and of Transport and Civil Aviation). Report (1959) Cmnd. 630.	Highway Act, 1959.

*Committees**Action taken*

Committee on Matrimonial Proceedings in Magistrates' Courts (Arthian Davies Committee), 1958-59 (Home Office).

Report (1959) Cmnd. 638.

Committee on Business of the Criminal Courts (Streatfeild Committee), 1958 (Home Office).

Report pending.

Committee on Business in Chancery Division (Harman Committee), 1958 (Lord Chancellor).

Report (1960) Cmnd. 967.

Committee on Control and Investment of Funds in Court (Pearson Committee), 1958 (Lord Chancellor).

Report (1959) Cmnd. 818.

Committee on Conflicts of Jurisdiction Affecting Children (Hodson Committee), 1958 (Lord Chancellor).

Report (1959) Cmnd. 842.

Committee on Rating of Charities (Pritchard Committee), 1958 (Minister of Housing and Local Government).

Report (1959) Cmnd. 831.

Committee of "Justice" on Contempt of Court, 1958 (unofficial body of lawyers).

Report, April 1959.

Committee on Powers of Subpoena of Disciplinary Tribunals, 1960 (Home Office and Scottish Office).

Report (1960) Cmnd. 1033

Matrimonial Proceedings (Magistrates' Courts) Act, 1960.

Partially implemented by administrative action by Lord Chancellor.

Rating and Valuation Bill, 1960.

Administration of Justice Act, 1960.

Professions Supplementary to Medicine Act, 1960.

MECHANICS OF LAW REFORM

THE Law Reform Committee and its predecessor the Law Revision Committee have issued to date some sixteen reports scoring up some ten marks on the Statute Book. Brief particulars of the reports in question, and of the relevant enactments, are set out in the Appendix to Professor Wade's article. From this it appears that the only recommendations to which effect has not been given to date are those relating to the doctrine of consideration; perpetuities; conditions and exceptions in insurance policies; and the effects of tax liability on damages. The object of the following notes is to describe the mechanics by which the remaining recommendations have been carried into effect by the preparation and enactment of the necessary Bills.

All the reports of the two Committees have one common feature, namely that the recommendations have not been framed in the form of draft Bills nor (at all events expressly) in the form of draft clauses for incorporation in a Bill. Accordingly, the process of preparing the necessary legislation has followed the normal procedure applicable to other Government legislation which, very briefly, is as follows.

Government Bills are drafted (subject to minor exceptions not material to these notes) by the Parliamentary Counsel to the Treasury, acting on the instructions of one or more of the administrative departments of state. The Office of the Parliamentary Counsel was set up in 1869 with the object of improving the form and harmonising the style of parliamentary Bills promoted by the Government. Before that time (although there had been earlier experiments in the same direction) any department who had occasion to promote a Bill either drafted it themselves or went to the Bar for it. The process described in Jacob's *Law Dictionary*¹ reads curiously today:

“Public bills or acts of parliament are commonly drawn, such as relate to taxes, or other matters of Government, by the several public boards, according to their respective jurisdictions; others by such members of the House of Commons as are most inclined to effect the good of the public, particularly in relation to the bill designed, taking advice thereupon; and acts for the revival, repeal or continuance of statutes, or other legal matters, are framed by lawyers, members of the house, appointed for that purpose.

“The persons directed to bring in the bill present it in a competent time to the house, drawn out on paper with a multitude of blanks, or void spaces, where anything occurs that is

¹ 4th ed., 1835, title “Parliament.”

dubious, or necessary to be settled by the parliament itself, . . . being indeed only the skeleton of the bill.”

Others must judge whether the improvement and harmony contemplated in 1869 have been secured and preserved. The establishment of the office of the Parliamentary Counsel followed upon the nationalisation of legislation which was forced on an unwilling government in the course of the nineteenth century. The first Lord Halifax observed that when he first entered the House a member who saw an abuse needing a remedy introduced a Bill to put it right: twenty-five years later the practice was to make a speech attacking the Government for not introducing a Bill. The office has grown in size since the appointment of Sir Henry Thring as first Parliamentary Counsel, and today it consists of some sixteen members of the Bar, working full-time for the Government, with supporting staff. The methods of instructing the draftsman have also developed since then. Thring, in the preface to the 1902 edition of *Practical Legislation*, gives a delightful pen-picture of Gladstone and himself hammering out together in the former's house the structure and details of the Bill for the Irish Land Act of 1870 ²—“ he understood and revised every word of a Bill and even settled the marginal notes.” Today Ministers are usually content to settle the policy of the proposed Bill and master the finished article, leaving to their legal advisers and administrative officials the business of instructing the draftsman and working out the details which arise in the process of drafting. Indeed they scarcely have any option in that respect, for the preparation of a Government Bill is often a protracted business, occupying two or three members of the department, and two of the draftsmen in the Parliamentary Counsel Office (who almost invariably hunt in pairs), for three or even six months at a stretch. If time permitted, the process could often be protracted still further, with advantage to the finished product. But time is usually the enemy of those concerned with the drafting of Bills—though it is also their friend, for they are always striving after the perfection which (for reasons indicated below) is usually in fact unattainable; and the last bell, even if it comes too soon, does at least release them from that vain endeavour.

Time is of the essence because Bills must of course be produced in accordance with the requirements of the Government as worked out for each parliamentary session, beginning as a rule in November and ending (if possible) at the end of July. There is always hot competition for places in the programme for any session, and the priorities are worked out in the course of the first half of the year. All large and complicated or contentious Bills should be ready for introduction very early in the session, since otherwise they may fail to pass for lack of time. It is also highly desirable that a number of smaller Bills should be available at the same time,

² 33 & 34 Vict., c. 46.

either to get them out of the way or to be used as stopgaps in the event of any one or more of the major Bills failing—as inevitably happens occasionally—to come forward on time. The number of days available for legislation in a session is strictly limited, and these must on no account be wasted. In a normal session there will be sixty-odd programme Bills of assorted sizes to be drafted and introduced, and, as already implied, the longer the Bill the less time per square foot can be allowed for preparing it. Accordingly during the second part of any year the draftsmen are engaged at full stretch getting Bills ready for introduction. Later on (apart from the team or teams who are involved with the Finance Bill, who are under maximum pressure between February and June inclusive) they will be engaged mainly in attending Committee and other stages of the Bills in progress, drafting Government amendments and advising on other amendments, and preparing new Bills for late entry or in some cases for the following session. There is seldom much time to stand and stare and wonder why one is doing it.

Among the motives which do in fact bring new faces into the office of the Parliamentary Counsel is a desire to take part in the formulation of fresh law—a process highly spoken of (among others) by Macaulay. In practice the opportunities for formulating anything which a practising lawyer would regard as law are for the most part marginal. Most Bills affect the law in one way or another—indeed, apart from those which are required exclusively by the parliamentary convention which demands statutory authority for any new permanent head of expenditure, all of them do. But Bills are not as a rule *about* law, as a glance at the alphabetical list of titles at the beginning of any volume of the statutes will show. It is also unusual for the draftsman to get the chance to clear the ground of an existing code of legislation and rebuild from scratch. Such opportunities do occur (for example in the Army and Air Force Acts of 1955³ and the Naval Discipline Act of 1957,⁴ the House of Commons Disqualification Act, 1957,⁵ and the Mental Health Act, 1959⁶) but they are rare because Bills of that kind (which are not true consolidation Bills and are accordingly debatable to the full extent) are apt to consume more parliamentary time than their political importance warrants. The more normal method of renovating an antiquated statutory structure is to begin by patching with an amending Bill and go on to redecorate with a consolidation Bill (see for example the three Acts of 1949 relating to Patents and Registered Designs^{6a}). A Law Reform Bill is accordingly a welcome breath of fresh air to any draftsman.

On the mere technique of legislative drafting there is so much to

³ 3 & 4 Eliz. 2, c. 18, c. 19.

⁴ 5 & 6 Eliz. 2, c. 53.

⁵ 5 & 6 Eliz. 2, c. 20.

⁶ 7 & 8 Eliz. 2, c. 72.

^{6a} 12, 13 & 14 Geo. 6, c. 62, c. 87, c. 88.

be said that it would be hopeless to embark on the subject in this article. There is by now quite a formidable volume of literature on the subject, including full-scale works by Elmer Driedger (*The Composition of Legislation*) and Reed Dickerson (*Legislative Drafting*), published in Canada and the United States respectively during the past decade, which greatly reward the attention of any draftsman. Granville Ram used to say that it is even more difficult to write intelligibly about drafting than to draft intelligibly—which is true: but these books, and one should add the second chapter of Gowers' *Plain Words*, are outstandingly successful in that respect. Drafting a Bill does not differ in essentials from drafting any other instrument. The draftsman must (1) master the subject-matter; (2) ascertain in detail what primary and secondary effects the client wishes to secure or avoid; and (3) express the result in plain and unambiguous language. It is obvious that the last of these requirements often involves a dilemma. Plain language is not always unambiguous—e.g., “agreement that is not to be performed within the space of one year” or “accident arising out of and in the course of the employment”: *per contra*, language which (one hopes) is unambiguous may not be altogether plain at first reading—e.g., the formula for “multiple top-slicing” which appears in paragraph 10 of the Fourth Schedule to the Finance Act, 1960.^{6b} In the case of statutory drafting the horns of the dilemma are sharpened because the same document has to be designed to satisfy two distinct “legislative audiences”⁷: First (in point of time) the parliamentary audience, mainly composed of laymen, whose primary need is to ascertain, with the minimum of labour and preferably no reference to any document other than the Bill itself, what is the general purpose and effect of each clause or subsection which they are asked to pass; and secondly the expert lawyers and other professionals who will seek to find in the Act as passed a specific answer to each specific question upon which they have to advise or decide. One customer wants a picture and the other wants a Bradshaw. Lord Mancroft in the Upper House ridicules the Government for taking thirty-seven lines of “deathless prose” to state a specific proposition about Jewish barbers in Scotland⁸; while Vaisey J. protests (be it said, in the nicest possible way) that the application of a particular section to a particular case “is only to be discovered by a microscopic examination of its terms.”⁹ If only because of this dilemma, the drafting of a perfect Bill, or even of a really good Bill, is *ex facie* impossible.

In the case of Law Reform Bills the task is in some respects easier and in others more difficult than in the case of ordinary

^{6b} 8 & 9 Eliz. 2, c. 44.

⁷ Reed Dickerson, *op. cit.*, p. 34.

⁸ Parliamentary Debates, October 29, 1959, col. 178.

⁹ *Re Kellner's Will Trusts* [1950] Ch. 46, at p. 62.

Government programme Bills. It is more difficult because the draftsman cannot supplement his written instructions to the same extent as on a programme Bill. If he wants to know the particular reasoning which lies behind a particular conclusion or what view was taken upon some related question not specifically mentioned in the Report, he may or may not be able to get an answer—even though the instructions for the Bill are given by the Lord Chancellor's Department which also furnishes the Secretary of the Committee. In short, the primary function of the draftsman (namely to take his instructions right apart and test at all points for coherence and side-kicks) cannot usually be carried out to the full.

On the other hand the drafting is rather easier for three reasons. In the first place, the dual character of the legislative audience scarcely exists in relation to a Law Reform Bill. It seldom has any party-political impact, and the only Members of both Houses who are likely to interest themselves in the Bill as a Bill are those to whom it is also addressed as an Act. Thus, to take a simple illustration, there is no attempt in section 1 of the Law Reform (Enforcement of Contracts) Act, 1954,¹⁰ to explain to the reader what section 4 of the Statute of Frauds, 1677, is about, or what is the effect of the partial repeal of that section. Whereas Bills in general are made to pass as razors are made to sell, this particular razor can be designed to shave. Secondly, it can be assumed that the profession and the courts will readily believe that the Act means what it says, no more and no less. In this context it is not usually necessary to follow the advice of Stephen J. in *Re Castioni*¹¹:

“I think that my late friend Mr. Mill made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”

Thirdly, as a rule at least, there is less pressure of time on the draftsman. Law Reform Bills are relatively short, and not politically controversial. Accordingly it is not necessary—as it is with most substantial Government programme Bills—to have them ready for introduction at any particular time in the session in order to ensure their passage. That proposition has to be qualified where the Bill is introduced by a private Member of the House of Commons who has succeeded in the Ballot (as in the case of the

¹⁰ 2 & 3 Eliz. 2, c. 34.

¹¹ [1891] 1 Q.B. 149 at p. 167.

Variation of Trusts Act, 1958,¹² and the Corporate Bodies' Contracts Act, 1960^{12a}); but in general the timetable for the production of Law Reform Bills is less exacting than for most Government Bills.

By way of illustration (or contradiction) of the above general observations, there follow some notes on two of the ten Bills listed in Professor Wade's Appendix, one taken from the beginning and one from towards the end of the series.

1. THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934

Judged by present-day standards, this Act¹³ seems to have been put through with almost indecent speed. The first report of the Committee was dated March 7, 1934, and the second report (also dated March) cannot have been earlier. By March 27 Sir Claude Schuster, as he then was, was instructing the Parliamentary Counsel for a Bill to be introduced by the Lord Chancellor at the earliest possible moment. The Bill was drafted, cleared by the Home Affairs Committee and introduced in the House of Lords inside a month, and received the Royal Assent only three months later, on July 25. There were good reasons for treating this Bill as a matter of real urgency, for the traffic accident (to which the *actio personalis* rule was all too often relevant) was already assuming something more than the size of a man's hand, and there was room for speeches on the lines described by Lord Halifax. Apart from that, the arrangements for the planning of the Government's legislative programme (and for the scrutiny of Government Bills before introduction) were somewhat looser in those days than they are today, and it is hard to believe that this record is likely to be lowered.

Counsel's instructions precluded his giving effect to the Committee's disapprobation of the rule in *Baker v. Bolton* and *The Amerika*, an omission from the Act which is the subject of criticism by Professor Winfield¹⁴ and which did not pass without comment from two distinguished members of the Committee in the consultation which took place in the course of drafting. The Government felt that it would be difficult to amend the law so as to allow an employer to recover for the death of his servant without at the same time making provision for the converse situation. Since this would involve the creation of a new cause of action and arouse considerable controversy, the whole subject was left on one side. It may be said perhaps that the practical effects of this lacuna have been to some extent mitigated by growing judicial disapproval of the action *per quod servitium amisit*.¹⁵

¹² 6 & 7 Eliz. 2, c. 53.

^{12a} 8 & 9 Eliz. 2, c. 46.

¹³ 24 & 25 Geo. 5, c. 41.

¹⁴ *Textbook of the Law of Tort*, 2nd ed., pp. 221-222.

¹⁵ *I.R.C. v. Hambrook* [1956] 2 Q.B. 641 where the strictures on this form of action by Lord Sumner in *The Amerika* [1917] A.C. 38, 60 were echoed.

Little difficulty arose in connection with section 2 (1) and (2), which brought adopted and illegitimate children within the purview of Lord Campbell's Act (provisions now replaced by section 1 of the Fatal Accidents Act, 1959¹⁶); nor with section 2 (3) which nullified the effect of cases such as *Clark v. L.G.O.C.*¹⁷ and allowed funeral expenses incurred in respect of the deceased to be recovered in actions brought under that Act. In view of the recent decision in *Stanton v. Ewart F. Youldon Ltd.*¹⁸ it is interesting to notice that the Government resisted as otiose an amendment which would have expressly limited recoverable funeral expenses to such as were reasonable. It was felt that this was a matter that could be left to the courts.

Two matters in clause 1 of the Bill particularly exercised the draftsman and his critics on the Law Revision Committee. The solutions arrived at are now section 1 (4) and section 1 (2) of the Act.

The formula in section 1 (1) providing for the survival of a cause of action requires it to have been vested in, or subsisting against, a person on his death. The Committee had been specially concerned with cases where a tortfeasor died in the accident which caused the plaintiff's injuries. As originally drafted, clause 1 (4) provided that, where a person died *in the interval between* his wrongful act or omission and the suffering by the plaintiff of the consequent damage, a cause of action should be deemed to have been subsisting against that person before his death. Doubts were expressed whether this provision would cover the case where the tortfeasor's death coincided with the damage he had occasioned and the subsection was modified in deference to those representations to make express provision for this eventuality. It is perhaps worth noticing that the draftsman's abstention from any provision for the converse situation, *viz.*, the instantaneous death of the injured party, has been justified by *Morgan v. Scoulding*.¹⁹ In that case it was contended that in such circumstances no cause of action could be said to have been vested in the victim of the accident on his death. Lewis J. had no difficulty in holding that the cause of action was complete by the suffering of the injury which caused the death and which *ex hypothesi* preceded it by however small an interval. Although only a decision at first instance, the learned judge's reasoning does not appear to have been subsequently challenged. Sir Carleton Allen, in an exchange on the point with the editor of the *Law Quarterly Review*, has however expressed dissent where death is caused by electric shock.²⁰

The evolution of section 1 (2) is also of interest. The Committee, in recommending the survival of causes of action for the

¹⁶ 7 & 8 Eliz. 2, c. 65.

¹⁷ [1906] 2 K.B. 648.

¹⁸ [1960] 1 W.L.R. 543.

¹⁹ [1938] 1 K.B. 786.

²⁰ 57 L.Q.R. 462.

benefit of the estate of a deceased person, advised that the damages recoverable should be limited to the "loss to the estate." The draftsman considered (and convinced those instructing him) that no suitable formula in positive terms could be devised to express this concept, except in the case of funeral expenses falling on the estate and accordingly the negative form of subsection (2) was adopted.

The restrictions imposed by the subsection were of two distinct kinds. Paragraphs (a) and (b) precluded the recovery of damages of certain kinds which the deceased would have been entitled to recover had he lived. In the Bill as introduced damages for pain and suffering were also excluded by the subsection, but the relevant paragraph was omitted in the House of Lords at the private suggestion of Lord Wright (who was of course a member of the Committee). It is not altogether clear from the debate in the Lords (and the office papers throw no light upon the point) why this omission was made, nor why, once it was made, the exclusion of exemplary damages (at first described as "vindictive") was retained. Paragraph (c), on the other hand, was designed to exclude the kind of damages which could not have been recovered by the deceased if he had not died. Unlike Lord Campbell's Act, the Bill created no cause of action in respect of the death, but merely preserved such causes of action as were vested in the deceased. Gains or losses consequent on his death were accordingly irrelevant, since they could not have affected the deceased for good or ill. The accrual of insurance money or the cessation of an annuity, for example, are to be disregarded.²¹ It is thus only an apparent paradox that the Committee's proposal for limiting the damages to the loss to the estate eventually emerged in the form of a provision excluding losses (and gains) to the estate from the calculation.

What paragraph (c) did not prevent, however, was the recovery of damages for loss of expectation of life. As Lord Russell of Killowen observed in *Rose v. Ford*²² such damages

"... are not for loss to the estate consequent on the death, but for the loss to a living person consequent on the wrongful act of the defendant."

The relevance of the death is purely evidentiary as providing conclusive proof that the deceased's expectation of life has been curtailed by the accident. Damages under this head have proved to be one of the most common items claimed under the Act of 1934, but one may be forgiven for wondering whether this result was intentional, and in particular whether the form of the Committee's report, and the legislation which followed it, would have been different if the case of *Flint v. Lovell*²³ (in which the Court of Appeal gave recognition to this head of damages) had been decided

²¹ *Per* Lord Wright in *Rose v. Ford* [1937] A.C. 826, 842.

²² *Ibid.* at pp. 826, 838.

²³ [1935] 1 K.B. 354.

a year or two sooner. Admittedly the principle was hardly new ²⁴ but it does not appear to have been contemplated by anyone that damages of this kind would be awarded under the new provision. The absurdities inherent in such awards have been pungently exposed by Sir Carleton Allen in an article under the title "Is Life a Boon?" ²⁵ where the learned author in characteristic vein concludes:

"It is clear that we need another statute and it is to be hoped that it will not, in the ingenious and diverting manner of so many of our statutes, produce exactly the opposite effect of that which was intended."

The first claim of this kind under the Act did not in fact succeed since MacKinnon J., who decided *Slater v. Spreag*,²⁶ adopted the "subjective" test which was subsequently disapproved in *Rose v. Ford*. He held that where the deceased died without recovering consciousness, no damages were recoverable for loss of expectation of life since the deceased had never been in a condition to experience the disappointment of his expectations. It was perhaps a pity that this view did not ultimately prevail: but since the decision of the House of Lords in *Benham v. Gambling* ²⁷ different criteria of assessment have of course diminished the monetary importance of claims of this kind.

Finally, there can be no doubt on the evidence that neither the draftsman nor those who instructed him contemplated that a claim for penalties under the Income Tax Acts would be preserved by section 1 (1) against the estate of a deceased defaulter, as was held to be its effect in *Att.-Gen. v. Canter*.²⁸ Since the Act of 1934 does not extend to Scotland or Northern Ireland (section 4 (2)), this decision created an anomaly which has only now been remedied by Part III of the Finance Act, 1960.

2. THE OCCUPIERS' LIABILITY ACT, 1957

The Third Report of the Law Reform Committee, on occupiers' liability to invitees, licensees and trespassers was made in October 1954, and published in November. The Occupiers' Liability Act, 1957,²⁹ passed on June 6, 1957. This interval of two-and-a-half years contrasts with the interval of four months in the case of the Act of 1934, and the difference merits a word of explanation. In the first place, as already mentioned, the process of actually getting a Bill into the Government's legislative programme had stiffened considerably in the interval between the two. It was now considered necessary to give the informed public time to digest and

²⁴ Cf. Field J. in *Phillips v. L.S.W.Ry.* (1879) 5 Q.B.D. 78, 80.

²⁵ 57 L.Q.R. 462.

²⁶ [1936] 1 K.B. 83.

²⁷ [1941] A.C. 157.

²⁸ [1939] 1 K.B. 318.

²⁹ 5 & 6 Eliz. 2, c. 31.

consider the Committee's report before even asking the Government to decide to implement it, and in any event the report had come too late in the year for the Bill to be regarded as a candidate for the 1954-55 session. In practice it did secure a place in the programme for the following session; but for various reasons (including the fact that the draftsman in charge of the Bill was also in charge of the Finance Bill, and accordingly unable to attend to anything else throughout the spring) it was not ready until May 1956, when it was introduced in the Lords—mainly for the purpose of giving it an airing, because by then it had little hope of passing, even if its progress had not been held up by the Suez crisis. It did in fact pass the House of Lords, but only in the tail-end of the session in the autumn; and it had to start again in the next session, being introduced in the Commons in December 1956.

The Bill passed both Houses without amendment, and indeed the text of the Act as passed in June 1957 differs surprisingly little from that of the first draft which was sent out in October 1955—surprisingly little, that is, in view of the amount of discussion that took place between this draft and the first introduction of the Bill in May 1956. The only extensive changes were in sections 3 and 4 of the Act dealing with the less basic points of the effect of a contract on the occupier's liability to a third party and of a landlord's liability in virtue of his obligation to do repairs. It may seem, therefore, that (even allowing for the interval caused by work on the Finance Bill) a good deal of time must have been wasted in this discussion. There are in fact two answers to this, which deserve a moment's consideration.

The first is that the time taken was largely due to the submission of the draft Bill to certain members of the Law Reform Committee, and to considering and dealing with their comments. This is a process which is bound to take time. The members presented with a draft in a perhaps unexpected shape, need time to consider it (and of course have to find time to consider it on top of their other activities). The comments of one do not always agree with the comments of another. And in almost all cases the comments call for a detailed reply by way of explanation or argument, and this may lead to a second or third round of comment—particularly as it is not always easy in a correspondence of this sort for the draftsman to be really sure that he appreciates the criticism of his draft, and there is nothing more useless and dangerous than to make a drafting change without really understanding the criticisms. In this instance the draft seems to have been sent out to the members of the Committee in the middle of November 1955. The first comments were received before the end of that month, but most of them were not received until after Christmas; and the discussion on them with the members concerned was not in all cases finished till the second half of February, though

the draftsman in fact reacted to each set of comments in a matter of two or three days from receiving them.

The second answer to the suggestion that time was wasted in the winter is that a comparison of the Act with the first draft of the Bill would be misleading if it suggested that in the first draft the draftsman got clauses 1 and 2 pretty well right but was badly astray in clauses 3 and 4. This overlooks the fundamental difference between sections 1 and 2 and sections 3 and 4—the latter making more or less specific and restricted changes in the law, while the former set out to replace a basic principle of the common law with a new principle. The essence of the Committee's recommendation was (para. 76) that "in order to get away from the discussion which had been provoked in the past by the term 'unusual danger,' and to give the courts greater freedom to decide each case in accordance with its real merits, the duty would best be redefined. . . ." There are two points here. The first is the reference to the discussion provoked by the term "unusual danger"—a term taken from the judgment of Willes J. in *Indermaur v. Dames*. It may be thought that a good deal of the trouble with the old law about invitees and licensees arose precisely because the courts had fallen into the way of construing the language of this judgment as if it were language contained in an Act of Parliament. This practice was indeed referred to and in terms repudiated in four of the opinions delivered in the House of Lords in *London Graving Dock Co., Ltd. v. Horton*³⁰—at page 745 by Lord Porter, at page 751 by Lord Normand, at page 761 by Lord MacDermott and at page 779 by Lord Reid; but as between Lords Porter and Normand on the one hand and Lords MacDermott and Reid on the other there is a marked difference of emphasis in the repudiation, and in the relatively short opinion of Lord Oaksey, in which he joined with Lord Porter and Lord Normand to allow the appeal, the final sentence begins "As I read the words of Willes J." The majority in fact all treated or came near to treating the language of Willes J. as a binding statement of the law—thereby producing a result which the Law Reform Committee (para. 77 (i)) regarded as unjust.

What the Committee asked the draftsman to do (as brought out by the second part of the quotation from their report in the last paragraph above) was to sweep away the judgment of Willes J., and let the courts make a fresh start with a principle which they could adapt to the varying circumstances of each case. This comes near to asking for the impossible—particularly when it is coupled with a recommendation (para. 78) that there should be an attempt to codify this branch of the law. It is in effect hoping to replace a principle of the common law with a new principle of the common law: instead of having the judgment of Willes J. being construed as if it were a statute, one is to have a statute which can be

³⁰ [1951] A.C. 737

construed as if it were a judgment of Willes J. The difficulties of this are admirably exposed in the minority report of Diplock J. (as he is now). In the result the draftsman described clauses 1 and 2 of his first draft as "an exercise in saying nothing"—certainly it was the sort of exercise which depends essentially on not saying too much. In fact by far the greater part of the discussion with members of the Committee centred on these two clauses rather than on clauses 3 and 4, and the relatively slight changes made in the earlier clauses in the light of this discussion are capable of having a much more profound effect on the law than the more extensive rewriting in clauses 3 and 4.

As it happened, any less radical approach to the main problem dealt with by clauses 1 and 2 of the Bill might have led to considerable embarrassment on the publication, while the Bill was before Parliament, of the report of *Slater v. Clay Cross Co., Ltd.*³¹ in the Court of Appeal. This was not a case of occupiers' liability at all³²; but part of the argument had proceeded as if it were, and the leading judgment, delivered by Denning L.J. and concurred in generally by the other members of the court, contained two very material passages. First he said³³:

"The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decisions of the courts. . . . The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees."

Secondly, in dealing with the defence of *volenti* he said³⁴:

"Even in cases which concern the condition of premises like *London Graving Dock Company Ltd. v. Horton* which was mentioned to us, knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault. I tried to explain as much in *Greene v. Chelsea Borough Council*³⁵ and *Cuthbert v. Mason* (unreported)."

The first of these passages of course went to the root of the Committee's Report, which rested on the premise that the distinction between invitee and licensee, recognised and acted upon as it had been by the House of Lords as recently at least as *Jacobs v. L.C.C.*,³⁶ still had validity, even if some decisions had tended to blur it. The second passage appeared for the first time to give the authority of the whole Court of Appeal to a view of *Horton's* case

³¹ [1956] 2 Q.B. 264.

³² Cf. *per* Denning L.J., as he then was, *ibid.* at p. 269.

³³ *Ibid.* at p. 269.

³⁴ *Ibid.* at p. 271.

³⁵ [1954] 2 Q.B. 127.

³⁶ [1950] A.C. 361.

in direct conflict with that taken by the Committee ³⁷—"for the first time" because the draftsman at least had been unaware of the unreported case of *Cuthbert v. Mason*, and in *Greene v. Chelsea Borough Council* Denning L.J. was alone in dealing with the appeal on the ground that the plaintiff knew of the danger but did not voluntarily accept it: both the other members of the court proceeded on the ground that the plaintiff did not know of the danger.

Every lawyer of course has to take the chance that he will be faced *in mediis rebus* with a new decision seeming to stand the whole of the relevant law on its head; but this kind of situation has particular embarrassments for the draftsman. He has to aim at producing a Bill which, if passed, will be effective however the law may develop (bearing in mind the rule that Parliament is presumed to legislate in the light of the latest decision) and which the Lord Chancellor and Law Officers will be prepared to warrant if challenged in Parliament. The committee on a Bill being at best an unsatisfactory forum for legal argument even between Law Lords, the temptation is strong to insure (and on occasions over insure) against trouble, at the expense inevitably of clarity.

There are of course many other Bills not emanating from the stables of the Law Revision and Law Reform Committees which fall under the general description of Law Reform Bills. Among recent instances are the Cheques Act, 1957,³⁸ the Defamation Act, 1952,³⁹ and the Law Reform (Personal Injuries) Act, 1948.⁴⁰ Anyone who is interested in the tribulations of the draftsman of a Law Reform Bill on a subject in which distinguished lawyers have previously interested themselves could with advantage refer to the debates in the Lords in December 1947, on the Bill for the last-mentioned Act,⁴¹ in the course of which Counsel's accurate and elegant version of the main proposition in clause 1 was first compared unfavourably with Mr. Asquith's Bill of 1893, and subsequently discarded in favour of a draft derived from a Bill introduced in the Commons by Mr. Greaves-Lord (as he then was) in 1933. He may also care to reflect a moment on a recent decision on section 2 of the same Act, namely *Hultquist v. Universal Pattern & Precision Engineering Co., Ltd.*⁴² This was the sixth case dealing with a particular point on that section—a relatively simple enactment, which is only just over a page in length, and deals with the point specifically and, as the Court of Appeal thought, plainly in subsection (6). He might well wonder, as it seems did Sellers L.J. in *Hultquist's* case (p. 892), whether until that case

³⁷ Cf. para. 21 of their Report.

³⁸ 5 & 6 Eliz. 2, c. 31.

³⁹ 15 & 16 Geo. 6 and 1 Eliz. 2, c. 66.

⁴⁰ 11 & 12 Geo. 6, c. 41.

⁴¹ Parl. Deb., Vol. 152, col. 1183, Vol. 153, col. 249.

⁴² [1960] 2 W.L.R. 886.

reached the Court of Appeal, any of those concerned in any of the six cases had read to the end of the section—and might perhaps take a fresh view of Sir Carleton Allen's words (quoted above) about "the ingenious and diverting manner [in which] so many of our statutes produce the opposite effect of that which was intended."

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SOME PROPOSALS FOR REFORM IN THE LAW OF EVIDENCE

INTRODUCTION

VARIOUS proposals for the reform of the law of evidence will be considered under the heads of spouse witnesses, the Criminal Evidence Act, 1898, previous statements of witnesses, the rule against hearsay and exceptions to the hearsay rule. The article concludes with brief references to other desirable reforms, a reform which cannot be effected by legislation and the need for codification. This is a formidable list, but it has nevertheless been necessary to relegate to footnotes several further matters which ought not to escape the reformer's eye. The truth is that there are a great many parts of the law of evidence which are in need of reform. So much is this the case that an academic lawyer may perhaps be pardoned for wondering whether there is not, after all, something to be said for the cynical view that the law of evidence works as well as it does in practice because it is largely disregarded. Be that as it may, it is only fair to the existing law for someone who is to embark on an enumeration of its deficiencies to point out that he will be mainly concerned with cases which are a little outside the ordinary run, and that the present system has great merits. After all, it is such current rules as that which generally precludes any reference to the accused's misspent past, the rule against hearsay and the rules governing the examination of witnesses which make an English criminal trial the satisfying spectacle that it is when contrasted with some trials abroad. But complacency is something to be avoided at all costs. In spite of the antiquity of some of its parts and its utterly haphazard growth, our law of evidence has many good points, but it is very far from perfect and that is one reason why this article has been written.

SPOUSE WITNESSES

"The court desires to say that the confusion in regard to the matter is such that it is earnestly to be hoped that the legislature will pass a short Act that would put the matter beyond all doubt in the interest of those who have to administer justice."¹ These words were spoken by Darling J. in the Court of Criminal Appeal as long ago as 1912, and the subject was the law relating to the competence and compellability of the accused's spouse. Since the words were spoken, there has been no short Act of Parliament on

¹ *R. v. Acaster* (1912) 7 Cr.App.R. 188 at p. 191.

the lines suggested, and the case law on the subject has been further complicated by the decisions of the Court of Criminal Appeal in *R. v. Lapworth*² and *R. v. Algar*.³

In the following account of the existing law, it will be convenient to speak simply of the position of the accused's wife when criminal cases are considered, and of the defendant's or co-respondent's wife when stating the law applicable to a civil case, although the rules concerning the competence and compellability of spouses are the same for husbands and wives.

So far as civil cases are concerned, the effect of the Evidence Amendment Act, 1853, and the Evidence Further Amendment Act, 1869, is generally assumed to be that the defendant's wife is competent and compellable in all proceedings. The Act of 1853 provides that, except as thereafter excepted, the husbands and wives of the parties to any proceedings shall be competent and compellable. The exceptions relate to criminal proceedings and proceedings instituted in consequence of adultery. Criminal proceedings are now covered by the Criminal Evidence Act, 1898. The second exception was repealed by the Act of 1869, but it goes on to provide that the spouses of parties to proceedings instituted in consequence of adultery shall be competent to give evidence in those proceedings. There is not a word about compellability, and it is hardly surprising that doubts should have been entertained in some quarters as to whether the co-respondent's wife is a compellable witness in a divorce case. Although these doubts have for the most part been dispelled by the decision of the Court of Appeal in *Tilly v. Tilly*,⁴ there is no denying that the relevant statutory provisions could be more clearly expressed.⁵ The obscurity of the provisions relating to proceedings instituted in consequence of adultery pale into insignificance when contrasted with the difficulty, shortly to be discussed, of justifying the commonly accepted view that the defendant's divorced wife is competent and compellable in all civil cases.

In criminal cases, the accused's wife is a competent witness for him and, with his consent, for his co-accused in all proceedings. Without the consent of the accused, his wife is competent for his co-accused as well as for the prosecution in the proceedings specified in the schedule to the Criminal Evidence Act, 1898, to which additions have been made from time to time. Competence does

² [1931] 1 K.B. 117.

³ [1954] 1 Q.B. 279.

⁴ [1949] P. 240, criticised in Cowen and Carter, *Essays on the Law of Evidence*, p. 220, *et seq.* Even if the learned authors' criticisms of the decision that the respondent in divorce proceedings, and hence also the co-respondent's wife, is compellable are not accepted in full, there is great force in their subsequent criticisms of the privilege against answering questions concerning marital intercourse which exists in all proceedings under s. 32 (2) of the Matrimonial Causes Act, 1950. The repeal of this subsection may therefore be numbered among the desirable reforms in the law of evidence.

⁵ The relevant provisions are now s. 32 (3) of the Matrimonial Causes Act, 1950, and s. 3 of the Evidence Further Amendment Act, 1869.

not imply compellability in the criminal cases which have been stated thus far, but, in proceedings falling within the Evidence Act, 1877,⁶ crimes of personal violence against the wife and, probably, treason, the accused's wife is compellable for the prosecution, the accused and his co-accused. The above dogmatic statement of the law is based on the Criminal Evidence Act, 1898, the decision of the House of Lords in *Leach v. R.*,⁷ and the decision of the Court of Criminal Appeal in *R. v. Lapworth*.⁸ There is room for debate at a number of points, notably with regard to the cases, other than those covered by the Evidence Act, 1877, in which the accused's wife is compellable, for these are dependent on the common law. The original scheme of the Schedule to the Act of 1898 seems to have been to make the accused's wife competent (if not compellable)⁹ in those cases in which justice would often fail to be done if she could not be called. Offences against children were therefore prominent among the original scheduled cases. Some of the additions to the schedule seem to have been arbitrarily selected. For instance, it is difficult to justify the present law according to which a wife may testify against her husband if he is charged with contravening the National Insurance Act, 1946, although she cannot do so if he is charged with writing a letter threatening to murder her contrary to section 16 of the Offences Against the Person Act, 1861.¹⁰

In *R. v. Algar*¹¹ counsel for the defence conceded and the Court of Criminal Appeal confirmed that the accused's divorced wife is incompetent to testify for the prosecution with regard to matters occurring during the marriage when the charge is one of forging his wife's cheques, and thus defrauding her bank. The court accordingly quashed Algar's conviction on such a charge because the evidence of his former wife had been received at the trial. The marriage had been annulled before the proceedings were initiated, but it was a voidable marriage and Mrs. Algar's evidence related to the question whether she had authorised her husband to sign her cheques during its subsistence.¹² The decision appears to be something very like a fraudulent spouse's charter of immunity in cases in which authorisation is raised as a defence to a charge of forging the other spouse's cheques, for, to say the least, the defence will be a difficult one to rebut beyond reasonable doubt in the absence of that spouse's evidence. Nevertheless, if it is really

⁶ These are proceedings for public nuisance and are unimportant in the present context.

⁷ [1912] A.C. 305.

⁸ [1931] 1 K.B. 117.

⁹ It was commonly supposed that the accused's wife was compellable in the scheduled cases before *Leach v. R.* [1912] A.C. 305.

¹⁰ *R. v. Yeo* [1951] 1 All E.R. 864.

¹¹ [1954] 1 Q.B. 279. Some of the problems raised by this decision are discussed in an article by the present writer in [1959] *Criminal Law Review* 262, and several of the conclusions reached in that article are criticised by an anonymous writer at p. 685.

¹² This appears from the anonymous article mentioned in the last footnote.

necessary to pay scrupulous regard to the decision in one case, reached as long ago as 1802, and to everything said in arriving at that decision, merely because it has never been challenged, the Court of Criminal Appeal was bound to decide *R. v. Algar* as it did. In *Monroe v. Twistleton*,¹³ an action of assumpsit, the defendant's former wife had been divorced by Act of Parliament, and she was held to be incompetent to testify on behalf of the plaintiff to matters occurring during her marriage. "She was at that time bound to secrecy; what she did might be in consequence of the trust and consideration reposed by her husband; and miserable indeed would the condition of a husband be, if, when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice. If she might be a witness in a civil proceeding, she might equally be so in a criminal prosecution." The decision of the Court of Criminal Appeal in *R. v. Algar* can be supported on the following lines: In *Monroe v. Twistleton* the judge, Lord Alvanley, was clearly of the opinion that a divorced spouse was incompetent in criminal as well as civil proceedings to testify to matters occurring during her marriage to the accused. This opinion must be taken to represent the common law. The statutes of the middle of the nineteenth century relating to the competence and compellability of the spouses of parties do not apply to criminal cases. The Criminal Evidence Act, 1898, does not render the accused's wife competent for the prosecution in charges of forgery in which her bank is the defrauded party, therefore the accused's divorced wife is just as incompetent in such a case as she was in 1802.

Reflection on *R. v. Algar* prompts a question concerning the law relating to the competence and compellability of the defendant's divorced wife in a civil case. Suppose it is proposed to call her to testify to something which occurred during her marriage to the defendant and that an objection is taken to her competence to do so on the authority of *Monroe v. Twistleton*. How should the objection be met? Reference might be made to the Evidence Act, 1843.¹⁴ This statute provides that no person shall thereafter be excluded from giving evidence by reason of interest. The statute applies to civil and criminal proceedings alike, but it expressly declares that it shall not render competent any party to any proceeding, or the husband or wife of such persons. The ban in the case of parties to civil proceedings was removed by the Evidence Act, 1851, and the Evidence Amendment Act, 1853, removed the ban in the case of the husbands and wives of parties to civil proceedings.¹⁵ The argument in favour of the view that

¹³ (1802) Peake Add. Cas. 219.

¹⁴ This is suggested in the anonymous article mentioned in note 11.

¹⁵ Subject, in each case, to exceptions removed by the Evidence Further Amendment Act, 1869.

the Act of 1843 renders the defendant's divorced wife competent and compellable would be on the following lines: the incompetence at common law of the defendant's wife was due to interest, incompetence through interest was abolished in 1843 and the exception contained in the statute of that year relating to the husband and wife of a party is confined to present husbands and wives. This argument is fraught with many difficulties. In the first place, it is by no means clear that the incompetence of a party's spouse at common law was due to interest,¹⁶ secondly, if it was due to interest, the interest would not have existed, in the case of a divorced spouse, at the time of the proceedings, thirdly, the commissioners on common law procedure thought that *Monroe v. Twistleton* was still law in 1853,¹⁷ and finally, if the Act of 1843 removed the incompetence of a divorced spouse, *R. v. Algar* must be taken to have been wrongly decided because the Act applies to criminal as well as civil proceedings.¹⁸

An alternative method of countering the objection to the competency of the defendant's divorced wife would be to rely on the Evidence Amendment Act, 1853. The husbands and wives of the parties are made competent and compellable by section 1 of this statute, and it is not altogether unreasonable to contend that the word "wife" includes a divorced wife called upon to testify to matters occurring during her marriage. Strained as such a construction is, it seems to be a sounder basis of the competency of the defendant's divorced wife than the Evidence Act, 1843. It is, however, subject to the difficulty that, in *Shenton v. Tyler*,¹⁹ the Court of Appeal construed the word "wife" in section 3 of the Act of 1853 so as to exclude a widow or a divorced person. Section 3 provides that no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage. There is no insuperable objection to the same word bearing different meanings in different sections of the same statute, but it is difficult to feel complete confidence in such a construction in the absence of any authoritative decision in support of it.

If neither the Evidence Act, 1843, nor the Evidence Amendment Act, 1853, renders the defendant's divorced wife competent, she remains incompetent to testify to matters occurring during her

¹⁶ In Vol. IX of his *History of English Law*, Sir William Holdsworth says that we must probably bring under this category of exclusion the disqualification of husband and wife to testify on one another's behalf (p. 197). But he recognises that Coke justified the disqualification partly on the ground that a permission to testify might stir up dissension, and it is this point which is stressed in *R. v. The Inhabitants of Cliviger* (1788) 2 T.R. 263.

¹⁷ See their second report at p. 12.

¹⁸ The submission in the anonymous article mentioned in note 11 is that *R. v. Algar* was wrongly decided. The Court of Criminal Appeal was certainly not bound to follow *Monroe v. Twistleton* under the doctrine of precedent.

¹⁹ [1939] Ch. 620.

marriage on the authority of *Monroe v. Twistleton*, a case decided when divorce was almost unknown.

The foregoing account of the law relating to spouse witnesses shows that it is based on chaotic statutory provisions, the construction of which has been confused by case law. It is difficult to believe that anyone would deny the need for a clarifying Act of Parliament such as that recommended by Darling J. nearly fifty years ago. Although there is more room for argument on the question what the law ought to be, the suggestions that the defendant's wife (including his divorced wife) should be plainly declared to be both competent and compellable in all civil cases, and that the accused's present wife should be competent for the accused, his co-accused and the prosecution in all criminal proceedings are likely to command a large measure of support. The same is surely true of the suggestion that the accused's divorced wife should be both competent and compellable for either the prosecution or the defence. At this point agreement would no doubt cease. Ought the accused's present wife to be competent for a co-accused without the accused's consent? Should the accused's present wife be compellable as well as competent for both prosecution and defence in all criminal proceedings? Ought the accused's present wife to be compellable in the case of crimes of violence committed against her by her husband? These are all questions which would have to be considered by the draftsman of the suggested statute which is surely one of the most overdue reforms in the law of evidence.²⁰

THE CRIMINAL EVIDENCE ACT, 1898

An alteration of the present law concerning the competence and compellability of the accused's spouse would involve an amendment of the Criminal Evidence Act, 1898. Some further amendments may be suggested, although the matter is one on which a wide variety of views is entertained. Ought the accused to be obliged to enter the witness-box in order to be questioned by counsel for the prosecution? Should he, in other words, be deprived of his privilege not to testify? Is there any point in preserving the accused's right to make an unsworn statement from the dock? Should the judge, as well as counsel for the prosecution, be prohibited from commenting on the failure of the accused or his spouse to give evidence for the defence? Ought the privilege with regard to matrimonial communications conferred by section 1 (d) in the same

²⁰ For what it is worth, the writer's answer to the first question is yes, because the control of one spouse over the conduct of the other is and ought to be limited. The writer's answer to the second question is no, because the risks of perjury and matrimonial dissension consequent on compulsion, together with the possible shock to public opinion at the spectacle of a wife being compelled to criminate her husband, exceed the risk of a failure of justice in the absence of compulsion. The writer's answer to the third question is yes, but he must confess that he does not regard the matter as by any means self evident.

terms as those already quoted from section 3 of the Evidence Amendment Act, 1853, to be extended so as to protect widows, widowers and divorced persons from being obliged to disclose communications made to them by their spouses while they were married? ²¹ With the exception of the accused's right to make an unsworn statement, which is not a matter of any great importance, there does not seem to the writer to be a strong case for a change in the law on any of these points, but, in each instance, the proposal for a change has powerful advocates.²² As far as the everyday administration of the criminal law is concerned, all the above questions are trivial in contrast with the question whether proviso (f) to section 1 should be redrafted and, if so, to what extent?

As is well known, proviso (f) is the second and more important half of the compromise enacted in 1898. If the accused when giving evidence were to have been placed in precisely the same position as the ordinary witness, he would have been treated too favourably when he came to be cross-examined because he could have refused to answer questions on the ground that the answers might incriminate him. In cases in which he had a criminal record, it was felt that the accused would have been treated too unfavourably had he been exposed to the full rigours of cross-examination to credit in which a previous conviction for any offence might be put to and proved against him under the Criminal Procedure Act, 1865.²³ The first of these difficulties was met by section 1 (e) which permits questions in cross-examination notwithstanding that they tend to criminate the accused as to the offence charged. Section 1 (f) meets the second difficulty by providing that, subject to exceptions, the accused may not be asked any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character. Without this proviso, the practical effect of the Act, in cases in which an accused who has a record goes into the witness-box, would have been to annihilate the rule that

²¹ If the privilege were extended, there should be a corresponding alteration of s. 3 of the Evidence Amendment Act, 1853. The text assumes that the construction placed on this section in *Shenton v. Tyler* [1939] Ch. 620, governs s. 1 (d) of the Act of 1898. It is sometimes suggested that the privilege should be extended so as to make it the joint privilege of both spouses, incapable of waiver by one alone.

²² The abolition of the accused's privilege not to testify is advocated by Professor Z. Cowen in 13 M.L.R. 378, and by Dr. Glanville Williams, *The Proof of Guilt*, 2nd ed., Chap. 3. See also the dissentient opinion in the recent report by "Justice" on the investigation of offences. Some extension of the privilege with regard to marital communications appears to be advocated in an unsigned note in 55 L.Q.R. 329. The judge is prohibited from commenting on the accused's failure to testify in some Commonwealth statutes.

²³ Quite apart from the position of the accused, there is a case for reforming the English law so as to make it conform to r. 21 of the Uniform Rules of Evidence according to which "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility."

evidence is inadmissible if it is only relevant because it tends to show that the accused is the kind of man who might have committed the crime charged.

The first exception relates to cases in which proof that the accused has committed or been convicted of another offence is admissible evidence to show that he is guilty of the offence charged. The intention is to allow cross-examination on the accused's bad acts on other occasions and his previous convictions when these are admissible against him in chief as they are, in the case of bad acts, when they do more than show that the accused is the kind of man who would commit the crime charged, and, in the case of previous convictions, by virtue of various statutory provisions. The intention of the exception is sensible enough, but the drafting leaves something to be desired for there is no provision for cross-examination on previous charges or acts tending to show bad character which do not amount to crimes, although these matters may sometimes be proved against the accused in chief on account of their relevance to particular issues in the case. For example, it may be permissible to prove in chief that the accused has committed adultery or seduced a girl above the age of sixteen. It seems odd that he should not be liable to be cross-examined on such matters if he denies them in his evidence in chief, but the cross-examination is difficult to justify on a literal construction of the first exception to proviso (f) and the others might be inapplicable.²⁴

Two matters which are best considered separately are covered by the second exception. First comes the case in which the accused puts his character in issue by asking questions of the witnesses for the prosecution in order to establish his good character or by giving evidence of good character himself or through others. Here again the intention of the exception is very sensible. It would plainly be absurd to allow a scoundrel to leave the jury with the impression that he is a man of untarnished reputation when he has a number of previous convictions. But there is an urgent need for further statutory provisions with regard to evidence of character. These would cover cases falling outside the Criminal Evidence Act, 1898, in which the accused does not give evidence but contents himself with calling a character witness or cross-examining the Crown witnesses with regard to his character, as well as the more frequent cases coming within the Act of 1898. It is submitted that the statute should provide that the accused's evidence of character should be confined to traits rendering it improbable that he committed the crime charged and that the prosecution's powers of cross-examination or calling evidence in rebuttal should be limited to traits rendering it probable that the accused did commit

²⁴ These points are developed by the writer in 76 L.Q.R. 537. The discussion in Cross, *Evidence*, pp. 315-317, is somewhat confused and must now be read subject to *R. v. Coker* [1960] 2 W.L.R. 836.

the crime charged. If there really is "no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half,"²⁵ the sooner such a thing becomes known to our procedure the better. It is right that a person charged with rape who gives evidence of his good character for chastity should run the risk of cross-examination concerning his previous convictions for offences involving unchastity, but it is utterly wrong that he should run the risk, as he does under the present law, of cross-examination about his previous convictions for larceny.

The other matter covered by the second exception to proviso (f) is a case in which "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." This is the most controversial part of the entire proviso. Some would say that it should be repealed, leaving an accused with a record free to denigrate the prosecutor and his witnesses without fear of cross-examination.²⁶ Others are in favour of some degree of redrafting,²⁷ while others consider the present position a satisfactory one. The main difficulty is occasioned by the fact that the very plea of not guilty is, in most cases, some kind of imputation on the character of the prosecutor or his witnesses on account of the insinuation that at least one of them is a liar. The courts have avoided such a broad construction by insisting that the accused does not lose his shield by a mere denial, however emphatic, of the prosecution's case. There must be some further allegation of disreputable conduct on the part of one or more of the Crown witnesses, although it seems that the suggestion that the witness is a persistent liar, as opposed simply to being a liar in the particular case, will suffice.²⁸

Beyond this comparatively restricted construction of the word "imputations," there have, as Mr. R. N. Gooderson observed in a recent broadcast, been three different approaches to the problem presented by this part of the proviso. The first is to disallow the cross-examination if the imputations were made in the legitimate furtherance of a particular defence. In effect, this involves altering the wording of the proviso by omitting reference to the "nature" as opposed to the "conduct" of the defence, and by adding some such phrase at the end as "save those imputations which are necessary for the proper development of a particular defence." The approach has found favour in cases in which consent has been pleaded in answer to a charge of rape,²⁹ but it is disapproved in one of the most recent judgments on the subject in the Court of

²⁵ *R. v. Winfield* (1939) 27 Cr.App.R. 139, *per* Humphreys J., convincingly criticised by R. N. Gooderson, 12 C.L.J. 386.

²⁶ Glanville Williams, *The Proof of Guilt*, 2nd ed., pp. 186-191.

²⁷ G. D. Nokes, 22 M.L.R. 511; see also recommendation 4 of the report cited *supra*, note 22.

²⁸ *R. v. Rappolt* (1911) 6 Cr.App.R. 156.

²⁹ *R. v. Turner* [1944] K.B. 463.

Criminal Appeal.³⁰ The second approach has been to allow the cross-examination whenever serious imputations are made against the prosecutor or his witnesses, but to direct the jury that they must only consider the accused's record when estimating the credit to be attached to his evidence and that they must not infer his guilt on the occasion under investigation from the fact that he has been guilty of other crimes on other occasions. The drawback of this approach is that it sometimes calls upon the jury to perform a well-nigh impossible task. The direction is probably of most value in the frequently recurring case in which the accused alleges that some part of his initial statement to the police which might be construed as an admission, or the entirety of a full confession of guilt, was improperly obtained. It is then possible for the judge to isolate the issue in his direction to the jury by telling them only to consider the accused's record in determining the weight to be attached to his allegations against the police.³¹ In the case of partial admissions, the jury may think that they were not improperly obtained and yet remain in reasonable doubt as to the accused's guilt on other grounds, while, in the case of a full confession, its voluntary character is, it seems, even for the jury, to be a separate issue from its truth.³²

Moreover the accused will already have had an opportunity of contesting that issue before the judge alone. In other cases, the

³⁰ *R. v. Cook* [1959] 2 Q.B. 340. There is no doubt that the first approach mentioned in the text has led to conflicting decisions, as was pointed out by the Court of Criminal Appeal in *Cook's* case, but one of the mysteries of this branch of the law is the scant respect paid to a statement of Lord Simon in *Stirland v. D.P.P.* [1944] A.C. 315. The fourth of the propositions with which Lord Simon concluded his speech was that "an accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses."

³¹ This is what happened in *R. v. Cook* (*supra*) where the trial judge told the jury he was sure they would not be prejudiced by the fact that the accused admitted to being convicted of criminal offences. He later said "when allegations are made against police officers, or indeed against any other witness for the prosecution, you should consider who is the person who is making them, and for that purpose you are entitled to take into consideration that he admits he is a convicted criminal. If you understand what I mean by that, it does not make it any more likely that he committed this crime, but it may mean that it is more unlikely that the allegations made against the police officers are true than if they were made by a person of good character." In the Court of Criminal Appeal this was said to have been a proper direction on "the limited effect of the appellant's bad character." I am indebted to the Registrar of the Court of Criminal Appeal for allowing me to see the papers in this case.

³² See *R. v. Bass* [1953] 1 Q.B. 681, *sed quaere*. The question whether a confession was voluntary within the meaning of the somewhat technical rules of English law should be decided solely by the judge. It is the weight to be attached to a confession which should alone come within the province of the jury (see an article by the present writer in [1960] *Criminal Law Review*, p. 385). Perhaps the rules governing the admissibility of confessions and of discoveries made in consequence of inadmissible confessions should be reconsidered, see Cowen and Carter, *Essays on the Law of Evidence*, essays 2 and 3, and Gotlieb, 72 L.Q.R. 209. If the onus of proving that a confession was not voluntary was placed on the accused, the case for a total repeal of this part of proviso (f) would be stronger.

distinction between utilising the results of the accused's cross-examination for the admissible purpose of shaking his credibility and for the inadmissible purpose of enhancing the probability of his guilt is apt to become little more than a legal quibble. This is particularly true of the class of case in which the jury has to choose between believing the accused when he says that he was not present on a particular occasion and the impugned witness who says that the accused was present. Nevertheless, the second approach has the merit of leading to some form of words by which the jury is instructed not to attach undue importance to the accused's bad record. The third approach is to hold that the judge has a complete discretion whether to allow or disallow the cross-examination, and it is this approach which is now in favour.

Perhaps the best solution of the problem would be to amend the proviso as contemplated by the first approach mentioned above so as to make it plain that the mere raising of a particular defence such as consent in the case of rape, self-defence³³ or provocation³⁴ does not deprive the accused of his shield, while leaving the judge free to exercise his discretion whether to allow the cross-examination in other cases. When cross-examination is allowed, there is no reason why the direction contemplated by the second approach should not be given. The intention of this part of the second exception to proviso (f) is that there should be tit for tat at a criminal trial at which the accused gives evidence that the Crown

³³ *R. v. Brown* (1960) 44 Cr.App.R. 181, a decision of the Court of Criminal Appeal, suggests that, as a matter of law, this part of the exception to the proviso is brought into play by a plea of self-defence. In addition to alleging that the prosecutor was the aggressor, the accused, who was charged with maliciously causing grievous bodily harm, also suggested that the prosecutor was drunk. It seems, however, that this was simply regarded by the Court of Criminal Appeal as something which justifies the judge in exercising his discretion to allow cross-examination. No reference appears to have been made to *R. v. Biggin* [1920] 1 K.B. 213, or to the discussion of that case in *R. v. Clarke* [1955] 2 Q.B. 469 at p. 475, where it is suggested that even allegations of a homosexual assault in support of a plea of self-defence would not bring the exception into play as a matter of law. *O'Hara v. H.M.A.*, 1948 S.C.(J.) 90 suggests that self-defence does not bring the exception into play in Scotland. In *R. v. Brown*, the trial judge used the following words to the jury: "You will not allow your knowledge of his (the accused's) past to sway your judgment of the evidence given in this case. It is relevant only in your consideration of the suggestion that it was Wright (the prosecutor) who was the aggressor on this occasion." This was the only live issue before the jury, and the case illustrates how it is often impossible to draw a distinction between utilising the effects of cross-examination under the Criminal Evidence Act, 1898, to discredit the accused and utilising them to demonstrate the probability of his guilt. The accused had several previous convictions for offences involving dishonesty, but it was only a conviction for violence which was put to him before verdict. This suggests that the cross-examination was intended to go to probability of guilt, a purpose for which it is sometimes said the cross-examination cannot be used on the authority of some remarks of Lord Sankey in *Maxwell v. D.P.P.* [1935] A.C. 309 at p. 321. I am indebted to the Registrar of the Court of Criminal Appeal for having allowed me to see the papers in *Brown's* case.

³⁴ *Cf. R. v. Cunningham* [1959] 1 Q.B. 288 at p. 290 and note by the present writer, 75 L.Q.R. 186.

witnesses are not the kind of people to be believed on oath with the implication that he is that kind of person. This is reasonable enough, provided it is made plain that the proviso does not preclude the accused from raising certain defences without fear of an adverse exercise of the court's discretion in the matter of cross-examination on his record, and provided that the judge considers it possible effectively to direct the jury not to use the accused's record as the basis of an argument that he is the kind of man who would commit the crime charged. It is, however, readily understandable that there should be many who maintain that the total repeal of this part of section 1 (f) (ii) would be a safer course in the interest of the due administration of justice than the compromise of redrafting which has just been suggested.

The third exception to proviso (f) is where the accused has given evidence against any other person charged with the same offence. Here again the intention is sensible for the accused is, *quoad* his co-accused, a witness for the prosecution. But it is open to question whether the drafting is not too narrow as it should be made to cover the case of a joint trial in which the offences charged are different.³⁵ This is of course a small point because the contingency is a comparatively rare one, but it is hoped that enough has been said to show that there are some major issues on which there is at least a case for the redrafting of parts of the Criminal Evidence Act, 1898.

PREVIOUS STATEMENTS OF WITNESSES

The practical operation of three rules relating to the admissibility of the previous statements of witnesses is not altogether satisfactory, and the situation has not been as greatly improved by the Evidence Act, 1938, as might be supposed. The rules in question are: that which prohibits the proof of prior consistent statements (sometimes called the rule against self-corroboration), the rule that the prior inconsistent statements on which witnesses may be cross-examined are not evidence of the facts stated and the rule prohibiting a party from impeaching the credit of his own witness. As will be seen, a case can be made out for abolishing each of these rules, although a less drastic course would be to amend, extend and clarify some of the provisions of the Evidence Act, 1938.

PRIOR CONSISTENT STATEMENTS

The first rule was concisely stated by Nevill J. in the Court of Appeal in *Jones v. South Eastern and Chatham Railway Company's Managing Committee*³⁶ when he said "you are not entitled to give evidence of statements on other occasions by the witness in

³⁵ *R. v. Roberts* (1936) 25 Cr.App.R. 158.

³⁶ (1918) 87 L.J.K.B. 775 at p. 779. The most recent example is *Fox v. General Medical Council* [1960] 3 All E.R. 255.

confirmation of her testimony." The appellant was a charwoman who had unsuccessfully claimed workman's compensation in respect of an injury to her thumb. She contended that the injury was sustained when she was working for the respondents, while the respondents contended that the appellant injured her thumb at home. The respondents called witnesses to prove admissions made by the appellant that her injury was sustained at home, but the trial judge nevertheless refused to allow her to call witnesses to confirm her evidence by swearing that she had told them that she had hurt her thumb while working for the respondents. The Court of Appeal held that the judge had acted correctly and accordingly dismissed the charwoman's appeal against the rejection of her claim.

The justification of the rule under consideration is usually said to be the risk that the evidence may be fabricated. In the oft-quoted and cynical words of Eyre C.B. "the presumption is . . . that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."³⁷ Like so much of the reasoning on which our law of evidence is based, this may well be thought to belong to a bygone age, an age when the parties could not give evidence and when it was perfectly reasonable to hold that there was no such guarantee of the trustworthiness of a self-serving statement as would justify its reception as evidence of the facts stated under what would now be described as an exception to the rule against hearsay. The situation is entirely different when the party is before the court, as he is today, ready to be cross-examined with regard to his previous statement and the circumstances in which it was made. Even if the reasoning of Eyre C.B. remains valid at all, it can, and always could, only apply so as to exclude the previous consistent statements of a party, whereas the rule under consideration applies to all witnesses.

A sounder and less cynical justification of the rule is that the confirmatory evidence is insufficiently relevant to warrant its reception having regard to the collateral issues which might be raised concerning such matters as the precise terms of the previous statement and the circumstances in which it was made. Once it is realised that the whole question is one of relevancy, it is easy to see how the rule against the reception of prior consistent statements should be formulated. The proof of such statements ought to be prohibited if, and only if, the sole reason why they are relevant is that they tend to prove some degree of consistency on the part of the witness. Unfortunately the courts tend to treat the rule as something independent of the general requirement that, in order to be admissible, an item of evidence must possess a reasonably high degree of probative value. The result is that evidence which undoubtedly complies with this requirement is sometimes excluded.

³⁷ *R. v. Hardy* (1794) 24 St.Tr. 1065 at p. 1093.

For example, while everyone would agree that the fact that a wife denied a charge of adultery in telephone conversations two days after it was made is at most only remotely relevant as tending to confirm her testimony to the same effect, most people would take a very different view of a telephone conversation with a doctor immediately after the adultery was alleged to have taken place in which the wife denied the charge and asked the doctor to examine her. Yet evidence of this nature was excluded under the rule prohibiting the proof of prior consistent statements in *Corke v. Corke and Cook*.³⁸

A further reason for the abolition of this rule as a separate rule of evidence may be found in the difficulty of enumerating the exceptions to it. Statements forming part of the *res gestae*, statements made at such a time as rebut the cross-examiner's suggestion that the maker's testimony is a recent invention and complaints in sexual cases are obvious instances, but there may well be others. For example, it is the common practice at a criminal trial to admit everything said by the accused when charged, including assertions favourable to his case which he repeats in his evidence. How is this eminently sensible and fair procedure to be justified as a matter of strict legal theory? As it has never been discussed, it is perhaps pointless to pursue the question.

A further exception to the rule was created by the Evidence Act, 1938, and the present law would undoubtedly be improved by the adoption of the suggestions for amending that act contained in the final report of the Evershed committee.³⁹ A further improvement would be effected by the extension of the statute to criminal cases. As things stand, the signed statement of a witness is admissible under the Act as tending to establish a fact of which direct oral evidence would be admissible, but there are several restrictions. Not only must the statement be written and the proceedings civil, but it is also essential that the statement should not have been made by "a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." This restriction is contained in section 1 (3) of the Act, and its effect is that the previous statement of a party is usually inadmissible if in his favour. The repeal of section 1 (3) is the principal proposal of the Evershed committee with regard to the Evidence Act, 1938. Its adoption could hardly lead to the wholesale tendering of valueless signed statements in confirmation of the maker's testimony because the judge has a discretion to exclude any statement under section 1 (5) of the Act where there is a jury,

³⁸ [1958] P. 93. The total abolition of the rule is advocated by J. A. Jolowicz in a note in (1958) C.L.J., p. 145.

³⁹ (1953) Cmd. 8878.

and he is not obliged to attach any weight to a statement admitted under the Act.

PRIOR INCONSISTENT STATEMENTS

Unlike the rule prohibiting the proof of prior consistent statements, the rule that the previous inconsistent statements on which witnesses may be cross-examined are not evidence of the facts stated is confined to the statements of witnesses who are not parties. Subject to special rules governing confessions of crime, in any proceeding, civil or criminal, the oral or written admission of a party may be proved against him in cross-examination or by independent evidence, and it constitutes evidence of the truth of that which it asserts under an exception to the rule against hearsay. In the case of a witness who is not a party, however, statements inconsistent with his testimony which are admitted or proved to have been made by him are not evidence of the facts stated at common law, and this is so whether the proceeding in which they are tendered is civil or criminal. The tribunal of fact is not allowed to choose which to believe, the witness's statement made on oath in court or his extrajudicial utterance. The unsworn statement may deprive the sworn of all probative value but, under the present law, this generally seems to be the maximum effect it can have, and the same is true of a deposition inconsistent with the subsequent testimony of its maker.⁴⁰ In the vast majority of cases, the operation of the present law is perfectly satisfactory. Either the witness gives a plausible explanation of the contradiction between his testimony and his previous statement, in which case it may be safe to act on the testimony, or else he does not give a plausible explanation of the contradiction, in which case it will generally be unsafe to act on either of his assertions. The defect in the present law is that it makes no allowance for the occasional case in which the witness's demeanour and things said by him in cross-examination justify the belief that the previous statement is true. An instance would be provided by a case in which a witness first makes a statement in favour of one party and then, in consequence of a quarrel or else of pressure brought to bear by the other party, gives evidence which flatly contradicts his original statement. On being satisfied with regard to the quarrel or pressure, the tribunal of fact might well be convinced of the truth of the original statement but, as the common law stands, the tribunal may not act on that statement.

⁴⁰ This is the effect of *R. v. White* (1924) 17 Cr.App.R. 60, *R. v. Birch* (1924) 18 Cr.App.R. 26, and *R. v. Harris* (1927) 20 Cr.App.R. 145, cases in which Crown witnesses' evidence was inconsistent with a statement to the police or in a deposition, but, in *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91 at p. 99, Pollock C.B. seemed to think that the jury might choose which to believe, the witness's testimony, or his previous statement. The rule was confirmed by a full Court of Criminal Appeal in *R. v. Golder and Others* [1960] 1 W.L.R. 1169.

So far as civil cases are concerned, the Evidence Act, 1938, appears to have introduced a beneficial amendment of the common law provided the inconsistent statement is in writing and signed by the witness. When such a statement is properly before the court, as it is if admitted by the witness in cross-examination or proved by independent evidence, it is admissible to prove the facts stated under section 1 of the Act.⁴¹

It is in connection with the previous inconsistent statements of witnesses that a major improvement on the common law would be effected by the extension of the Evidence Act, 1938, to criminal cases. One of the most common instances in which a previous statement is contradicted in court by its maker is the criminal trial at which a witness for the prosecution either repudiates what he had stated in writing to the police, or else resiles from the whole or part of his deposition. Under the present law, these documents are not evidence of the facts stated,⁴² and there must be many instances in which a judge would be amply justified in directing the jury that they might treat them as such evidence.

So far as the general rule that a witness's inconsistent statements are no evidence of their truth is concerned, some reformers would no doubt rest content with the extension of the relevant provisions of the Evidence Act, 1938, to criminal cases, leaving inconsistent oral statements to have their present effect of neutralising the witness's testimony, but others would say that whether the statements are oral or written, they should be admissible as evidence of the facts stated whenever this is warranted by the circumstances of the case.⁴³

THE IMPEACHMENT OF A PARTY'S OWN WITNESS

Before the Evidence Act, 1938, came into force, it was not possible for a party calling a witness to put to him in chief or in re-examination a statement inconsistent with his testimony without first obtaining leave to treat the witness as hostile. If the witness may be treated as hostile, the examination proceeds like a cross-examination and no further question of the prohibition on the impeachment of a party's own witness arises. As long as the previous statement of a witness was inadmissible as evidence of the facts stated, there was some sense in prohibiting a party from

⁴¹ *Burnell v. British Transport Commission* [1956] 1 Q.B. 187 at p. 190.

⁴² *R. v. Fraser* (1956) 40 Cr.App.R. 160, decides that, in any case of an inconsistent statement, counsel for the prosecution must hand the statement to the judge and ask leave to treat the witness as hostile. There is no suggestion that the statement can be used as evidence of the truth of its contents. The precise implications of *Fraser's* case may require consideration. Is the contradiction necessarily sufficient evidence of hostility?

⁴³ For what it is worth, this is the writer's opinion. Very often the previous statement is not denied. It is true that when the statement is denied, a collateral issue is raised, but this is just as liable to happen under the present law when the statement has to be proved under s. 4 of the Criminal Procedure Act, 1865.

putting it to his witness because his only object in doing so must necessarily have been to cast doubt on the veracity of the testimony. If the witness was merely unfavourable, in the sense that his evidence did not come up to his proof, although he showed no signs of unwillingness to tell the truth at the instance of the party calling him, that party might not discredit him, but he could call other witnesses to prove facts which contradicted his evidence. To quote Buller J., "such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only."⁴⁴

According to their literal meaning, the words of the Act of 1938 render admissible as evidence of the facts stated the signed statement of any witness, favourable, unfavourable or hostile, consistent or inconsistent with his testimony. There is nothing in the statute suggesting that the statement may not be received at the instance of the party calling its maker if inconsistent with his testimony. It was, however, held by Barry J. in *Cartwright v. Richardson*,⁴⁵ that the Act has not had this effect because it has not overruled "the ordinary rules of procedure applicable in the trial of a civil action." One Joyce was called as a witness for the defendant to a claim arising out of an accident to a workman at his work. When he was being cross-examined, Joyce said something with regard to the behaviour of a winch at the time of the accident which was inconsistent with a signed statement previously made by him to the defendant's solicitors. Barry J. refused to admit this statement when the defendant's counsel sought to prove it in the course of Joyce's re-examination. Barry J. said "the only purpose of introducing this statement is to show that on an earlier occasion some portion of the account of the accident given by Mr. Joyce was differently described by him. If such evidence were admissible that might have the result of shaking the faith of the court in the evidence given by Mr. Joyce in the witness-box. That does not seem to me to be a proper use of the provisions of the Evidence Act, 1938." It is submitted that the statement was admissible under the statute because the purpose of putting it to Joyce in re-examination was not to discredit his testimony, but to exercise the defendant's undoubted right to contradict Joyce's testimony concerning the behaviour of the winch by other admissible evidence. In the words of Buller J., the impeachment of Joyce's credit would

⁴⁴ (1767) *Nisi Prius*, 297. The present law is complicated by the notoriously bad drafting of s. 3 of the Criminal Procedure Act, 1865, which applies to both civil and criminal cases. It is susceptible of a construction, which has never been applied by the courts, prohibiting a party from calling a witness to contradict his previous witness without the leave of the judge. This was pointed out most forcefully by Williams J. and Cockburn C.J. in *Greenough v. Eccles* (1859) 5 C.B.(n.s.) 786 at pp. 794 and 806. They were speaking of the corresponding section in the Common Law Procedure Act, 1854. Surely it is time that some attention was paid to their words.

⁴⁵ [1955] 1 All E.R. 742.

have been "incidental and consequential only." If the Evidence Act has not overruled some of the ordinary rules of civil procedure, the rule that a previous inconsistent statement admitted by a witness in cross-examination is no evidence of the facts stated ought to have remained unaffected, but there is authority to the contrary.⁴⁶ The view taken by Barry J. likewise seems to imply that a prior consistent statement should be inadmissible when none of the common law exceptions to the rule against self-corroboration is applicable, but a prior consistent statement has been admitted in just such a situation in at least one reported case.⁴⁷ It is evident, however, that there is room for two views with regard to the relation between the provisions of the Act of 1938 and the rule that a party may not discredit his own witness. Accordingly it is submitted that the statute should be amended so as to remove all doubt that, notwithstanding the rule, it enables a party calling a witness to tender that witness's previous statement as evidence of the facts stated, even when it contradicts the witness's testimony. Such a provision should, like the other parts of the Act which have been discussed, be made applicable to criminal cases.

If the foregoing suggestion was adopted, the rule that a party may not discredit his own witness would remain intact because a party would not be allowed to put the witness's statement to him (unless the witness was hostile) for the purpose of directly suggesting that the witness is prevaricating. Many reformers would abolish the rule altogether, and allow a party to impeach the credit of his own witness by means of such matters as his previous convictions and known bad character as well as by reference to prior inconsistent statements. This has been justified in the United States on the ground that parties have to take their witnesses as they find them and the witness should be regarded as the court's rather than that of the party calling him.⁴⁸ It is hoped that it is something more than a sentimental attachment to the present practice that leads the writer to believe that it is unnecessary to go to these lengths in England.

THE RULE AGAINST HEARSAY

The rule against hearsay only applies to cases in which a statement narrated by a witness or contained in a document is tendered as evidence of the truth of that which it asserts. Generally speaking, therefore, the reception of the previous statement of a witness does not raise a problem with regard to the hearsay rule because the statement is only tendered in order to establish the consistency or inconsistency of the witness's previous utterances with his present testimony. The distinction between receiving the statement for

⁴⁶ *Burnell v. British Transport Commission* [1956] 1 Q.B. 187 at p. 190.

⁴⁷ *Re Powe* [1956] P. 110.

⁴⁸ *American Law Institute's Model Code of Evidence*, Introduction, p. 21. See also Uniform Rules, r. 20 *et seq.*



this purpose and receiving it as evidence of the truth of its contents may seem to be nothing more than a legal quibble, but it is no more of a quibble than the distinction to which reference has already been made between cross-examining the accused as to his credit and cross-examining him as to the probability of his guilt. In the vast majority of cases, it is equally true that no problem with regard to the hearsay rule is raised by the reception of a witness's previous statement, whether that statement is proved or admitted by the witness himself in the course of his testimony, or whether the statement is proved by another witness. There are, however, two cases in which the previous statement of a witness is received as evidence of the truth of its contents. They are first, the reception of a statement under the Evidence Act, 1938, in a case in which the maker of the statement is called as a witness, and second, the reception of a party's admission in a case in which that party gives evidence. There is fairly general agreement that, in each of the above cases, the statement is received under an exception to the rule against hearsay when it is proved by another witness, but it is an open question whether the hearsay rule applies at all in these cases when the statement is proved by the person who made it, as when the maker of a statement received under the Evidence Act, 1938, had personal knowledge of the matters dealt with by the statement,⁴⁹ and verifies his signature in the course of his testimony, or when a party acknowledges in evidence that he made the statement alleged to constitute an admission and then endeavours to explain it away. The answer to the question depends on the scope of the rule against hearsay. If the rule is confined to cases in which the court is asked to give credit to someone other than the witness who is testifying, the reception of the statement, proved by the person who made it, does not constitute an exception. It is simply an example of the reception of relevant evidence. If, on the other hand, the hearsay rule is not so confined, the statement and admission are received under an exception to it.

The question raised in the last paragraph may be put with reference to rule 63 of the Uniform Rules of Evidence published in the United States in 1953: "Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible." If this rule represents English law, the reception of the previous statement of a witness as evidence of the truth of its contents constitutes an exception to the hearsay rule, even when the statement is proved by the witness himself. If the reception of such a statement does not constitute an exception to the hearsay rule according to English law, rule 63 would, for our

⁴⁹ If the statement comes within s. 1 (1) (i) (b) (duty to record), it is received under an exception to the rule against hearsay on more or less any formulation of that rule. This point is overlooked in Cross, *Evidence*, pp. 451-452.

purposes, have to be amended so as to read "evidence of a statement which is made other than by the witness who is testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible."

It is quite impossible to say whether rule 63 does represent English law because the rule against hearsay has never been authoritatively formulated. This would be a matter of little or no consequence if it merely meant that there is some uncertainty with regard to the theory underlying the reception of the previous statement of a witness in two comparatively unusual situations, but the absence of some such formula as that contained in rule 63 leads to the rejection of statements by persons who are not called as witnesses on wholly erroneous grounds, however correct the actual decision may be. For example, in *R. v. Gordon and Spencer*,⁵⁰ the accused were charged with conspiring to steal cotton from a dock. At their trial, the prosecutor wished to prove the amount of cotton lawfully taken away from the dock in lorries belonging to consignees, and he was allowed to do so by calling counters-off engaged at the dock to recite the amounts stated by checkers, who supervised the loading, to have been placed on various lorries. The accused were convicted, and their convictions were quashed by the Court of Criminal Appeal because what the checkers told the counters-off was "irrelevant to any question arising in this prosecution." When there is nothing in the surrounding circumstances to suggest special trustworthiness, it may be correct to maintain that the mere fact that an assertion is made is irrelevant to the question of its truth, but it is fantastic to suggest that a statement made by one employee to another in the course of his duty is irrelevant when the truth of the contents of the statement is in issue. If the maker of such a statement is dead, the fact that he was acting in the course of his duty is a ground for receiving it under an exception to the rule against hearsay, and the question whether its maker is alive or dead cannot conceivably affect the relevance as opposed to the admissibility of a statement. This does not mean that *R. v. Gordon and Spencer* was wrongly decided. The prosecutor should have called the checkers if they were alive, or proved their deaths as a condition precedent to the admissibility of the evidence of what they told the counters. As it was, evidence infringing the rule against hearsay had been received when no exception to that rule was applicable, and the convictions were quite properly quashed.

The deplorable habit of describing all evidence which infringes the hearsay rule and is not covered by an exception as "irrelevant" stems from Stephen's *Digest of the Law of Evidence*. This was a great pioneer work, although it is unfortunate that the book has come to be treated in some quarters as a kind of code of

⁵⁰ (1958) 42 Cr.App.R. 177. There was a further point concerning statements in a bill of lading which is not discussed in the text.

the English law of evidence. Its greatest defect is its failure to draw a sufficiently sharp distinction between relevance and admissibility.⁵¹ This has been stressed by many writers, but *R. v. Gordon and Spencer* shows that it is likely to be reflected in our case law at least until the rule against hearsay is authoritatively stated on the lines of rule 63 of the Uniform Rules.

EXCEPTIONS TO THE HEARSAY RULE GENERALLY

The problem of the exceptions to the rule against hearsay is no less pressing than the problem of the proper formulation of the rule itself. The Uniform Rules enumerate as many as thirty-one exceptions. The utility of a rule which requires such a vast number of exceptions is undoubtedly suspect, but the hearsay rule has undeniable merits. Anyone who has listened at the trial of a traffic offence to the protracted and frequently unimportant disputes about what the motorist said to the policeman and what the policeman said to the motorist will be alive to the desirability of restricting evidence of what was said as opposed to what was done on a given occasion to the minimum. The great virtue of the hearsay rule is that it reduces the opportunities for disputes about the exact words used on an occasion imperfectly recollected by all who were concerned with it. Yet it is open to question whether the interests of the due administration of justice are fully served by an exclusionary rule with a closed list of exceptions, however extensive that list may be. Even after all the recognised exceptions have been enumerated, it may be thought that a provision should be included according to which the judge has a discretion to admit oral or written statements made out of court as evidence of the facts stated in cases not covered by any of the specified exceptions, provided he is satisfied that the statement has substantial probative value, and if the party tendering the statement is unable, without undue inconvenience, to adduce better evidence. Most of the statements that have so far been made with regard to the judge's discretion concerning the admissibility of evidence relate to his power to exclude items of slight probative value. Many people would doubtless view with some suspicion a rule according to which the judge has a discretion to admit otherwise inadmissible evidence, but it is with regard to evidence rendered inadmissible by the rule against hearsay that such a discretion would be least objectionable, if only because of the difficulty, not to say the impossibility, of producing a list of all the situations in which evidence infringing the rule ought to be received.

There is much to be learnt by an English lawyer from the formulation of practically all the exceptions mentioned in the Uniform Rules, and it is only considerations of space that restrict

⁵¹ Stephen did use "deemed to be irrelevant" for "relevant but inadmissible," but, as Professor Montrose observes, he was not consistent in his headings, and the terminology is confusing (70 L.Q.R. at p. 547).

the present discussion to rule 63 (9) (c) dealing with one aspect of vicarious admissions, and rule 63 (20) which deals with the admissibility of a conviction as evidence of the facts upon which it was founded.⁵²

VICARIOUS ADMISSIONS

The ninth exception to the hearsay rule mentioned in the Uniform Rules provides for the reception, as against a party, of a statement which would be admissible if made by the declarant at the hearing if “(c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability.” The practical effect of the adoption of such a provision as part of the English law of evidence would be that, in an action brought by A against B on the footing that B is vicariously liable for the tort of his servant, that servant’s informal admission of liability may be tendered by A as evidence against B. As things stand, the servant’s statement would be inadmissible against B as a vicarious admission, although it might be received under some other head. Let it be supposed, for example, that A is suing B for damages for personal injuries caused by the negligent driving of B’s lorry by B’s employee, C. If C’s admission was made orally immediately after the accident in which A’s injuries were sustained, it might well be admissible as part of the *res gestae*. A number of questions might have to be considered in order to determine whether the statement is so admissible. These could include the question whether the statement was sufficiently contemporaneous with the event to which it related and the question whether the statement was exclamatory or testimonial.⁵³ If the statement was made in B’s presence, an argument in favour of its admissibility might well be advanced, however great an interval of time had elapsed between the accident and the making of the statement. Such an argument would give rise to a difficult problem concerning the application to a servant’s admission of the rules governing the admissibility of statements made in the presence of a party.⁵⁴ If C died before the trial of the action between A and B, and if C’s admission had been made in the course of his duty, A might rely on the common law exception to the hearsay rule relating to statements of deceased persons made

⁵² In particular, the following would have to be considered before a comprehensive measure of reform was undertaken; r. 63 (3) dealing with contemporaneous statements which, taken together with r. 63 (12) dealing with statements of physical or mental condition, provides a fair and concise wording to cover cases usually discussed under the *res gestae* doctrine; r. 63 (5) generalising the admissibility of dying declarations; r. 63 (10) enlarging the basis of the admissibility of declarations against interest; r. 63 (23) dealing with statements concerning the declarant’s own family history and avoiding such absurdities of the contemporary English law as that a man cannot testify to his own age.

⁵³ Kenny’s *Outlines of Criminal Law*, 17th ed., paras. 570–571.

⁵⁴ It is difficult to see how a master can adopt his servant’s admission in this context.

in the course of duty, and, here again, there can be little doubt that the most technical legal questions might be raised. Finally, if C's admission was in writing, some perplexing questions might be raised with regard to its admissibility under the Evidence Act, 1938.

Assuming that C's admission was made to a fellow servant in the course of a casual conversation, or to a police officer after caution,⁵⁵ or, if someone had been killed on the occasion under investigation, at a coroner's inquest,⁵⁶ it would be inadmissible against B. The adoption of rule 63 (9) (c) of the Uniform Rules would therefore have the merit of rendering important evidence admissible which is now excluded in addition to that of avoiding the technical questions mentioned in the last paragraph in the case of an item of evidence which may be admissible under the present law. It is therefore submitted that the adoption of rule 63 (9) (c) should be regarded as one of the more urgently needed reforms in the law of evidence. The present practice of making the servant a defendant in cases such as the hypothetical action of *A v. B* mentioned above does not get over the difficulty that the admission is not evidence against the employer and may be considered undesirable on other grounds. The submission with regard to a change in the law is made with all the more confidence on account of the fatuous nature of the reason given for excluding the servant's admission. The servant, it is said, is not "an agent to make admissions."⁵⁷ Some meaning may perhaps be attached to this curious phrase in cases in which it is necessary to ascertain whether the admission was made in the course of an authorised communication with a third party, but the phrase is devoid of all meaning in the context of the vicarious liability of a master for the tort of the servant alleged to have made the admission. In that context, the question is whether the servant has committed a tort in the course of his employment and any evidence admissible against the servant on the issue whether a tort has been committed ought likewise to be admissible against the master. The only plausible argument to the contrary would be that it is against public policy to receive the servant's admission as evidence against his master because servants might be encouraged to make untrue admissions in these cases. The validity of this argument depends on the extent of the risk that servants would be prepared to tell lies which might have the effect of rendering them tortiously or even criminally liable in order to spite their employer or his insurance company. It would be idle to deny the existence of the risk in some cases, especially those in which another servant is injured, but this is a danger that has to be

⁵⁵ When he would be a person "interested" within the meaning of the Act of 1938, even if the statement was otherwise admissible under that statute.

⁵⁶ Such a statement would not necessarily be signed or otherwise admissible under the Evidence Act, 1938.

⁵⁷ See *Burr v. Ware R.D.C.* [1939] 2 All E.R. 388, criticised by D. W. L., 55 L.Q.R. 490.

faced under the present law, for it is open to the servant to give evidence against his master by making admissions in court. The risk is therefore only likely to be increased to an infinitesimal extent by the reception of the servant's out-of-court statement as evidence against his master. It would not, of course, be in any sense of the word a conclusive item of evidence.

CONVICTIONS AS EVIDENCE OF THE FACTS UPON WHICH THEY WERE FOUNDED

Rule 63 (20) of the Uniform Rules provides for the reception, under an exception to the rule against hearsay, of "evidence of a final judgment adjudging a person guilty of a felony to prove any fact essential to sustain the judgment." From the analytical point of view, there can be little doubt that the reception of a conviction as evidence of the facts on which it was founded infringes the rule against hearsay. In addition, it will usually infringe the rule excluding evidence of opinion. The certificate of conviction is produced to the court and the identity of the person convicted is duly proved or admitted. The court is then asked to treat the certificate as an assertion of guilt. Even if it were possible to call a member of the jury responsible for the conviction, the evidence would still infringe the rule against hearsay in so far as it amounted to a narration of what was said by the witnesses at the original hearing offered to prove the truth of the witnesses' testimony. The juror's evidence would infringe both the hearsay and the opinion rules in so far as it amounted to a statement that he and his fellows believed the witnesses, made certain inferences and concluded that the accused was guilty.⁵⁸

Convictions have been rejected as evidence of the facts on which they were founded in a number of English civil cases culminating in *Hollington v. Hewthorn and Co. Ltd.*⁵⁹ Accordingly a conviction of rape is inadmissible in divorce proceedings brought against a husband on that ground, and a conviction of careless driving is inadmissible as evidence of the driver's negligence in civil litigation arising out of the same events. The principal reason originally given for the exclusion of the conviction was the fact that it might have been procured by the testimony of witnesses who would have been disqualified by interest from testifying in the civil case. Even after disqualification through interest was abolished by the Evidence Act, 1843, it could have been argued that it was unfair to admit a conviction of crime as evidence of the facts on which it was founded against the accused in subsequent civil proceedings on account of his inability to give evidence at the criminal trial, but

⁵⁸ The evidence of a single judge as to his findings of fact would be hearsay in so far as it consisted of a narration of what witnesses had said, and opinion in so far as it consisted of inferences from that material.

⁵⁹ [1943] K.B. 587. For a thorough review of the entire question, see Carter and Cowen, *Essays on the Law of Evidence*, 173.

arguments of this nature have lost all semblance of reality now that the rules governing the competence and compellability of witnesses are substantially the same in civil and criminal cases. It would be quite unrealistic to justify the exclusion of a conviction in civil litigation today on the ground that the accused's spouse was not compellable or because the conviction might have been in part due to the unsworn evidence of a child which would be inadmissible in civil proceedings. The other reason usually given for excluding the conviction is that it is *res inter alios acta*, but this is something that could be said of most evidence received under exceptions to the hearsay rule. The statement that a conviction is *res inter alios acta* may also be a mode of asserting that it does not create an estoppel in civil litigation, whereas it does have this effect in subsequent criminal proceedings brought against the same accused, but the submission that a conviction should be evidence of the facts on which it was based has nothing to do with the law of estoppel. The submission is that, owing to its probative value arising from the fact that the vast majority of convictions are well founded, the conviction should be admissible evidence in civil proceedings by way of exception to the rule against hearsay. It is not for one moment suggested that the conviction should be conclusive evidence of the facts on which it was founded.

The desirability of a reform of the present English law along the lines of rule 63 (20) is made abundantly clear by the difficulty of stating the extent to which a conviction is admissible as evidence of the facts upon which it was founded. *Hollington v. Hewthorn* decided that a conviction is not admissible as evidence of the facts in issue in subsequent civil proceedings. *Ingram v. Ingram*⁶⁰ decides that a conviction is admissible as a relevant fact in a matrimonial cause when the subject-matter of the conviction is not coextensive with the matrimonial offence charged. The result in this case was that a wife's conviction for espionage was admitted at the hearing of her husband's petition for divorce on the grounds of cruelty and constructive desertion in order to show that she had been guilty of conduct leading the petitioner, an R.A.F. sergeant, to suppose that she had been guilty of espionage. Opinions may differ on the question whether there is rhyme or reason in the distinction between *Hollington v. Hewthorn* and *Ingram v. Ingram*, but, long before *Hollington v. Hewthorn* was decided, there had existed the problem of reconciling the rule that a witness's conviction of crime is admissible in cross-examination to credit as evidence that he is not to be believed on oath with the rule that a party's convictions are inadmissible as evidence of the facts on which they were founded when those facts are directly in issue in a civil case. In these circumstances, it is anybody's guess whether, according to the present English law, evidence of a previous conviction is admissible in criminal proceedings in which

⁶⁰ [1956] P. 390.

the accused is not the person who was previously convicted so that there is no question of an estoppel. For example, the writer has been credibly informed that, on a charge of receiving stolen goods, it is not unheard of for the theft to be proved by means of the thief's conviction coupled with evidence identifying the goods alleged to have been received with those which were the subject-matter of the conviction. Is this practice in accordance with our rules of evidence? The thief's conviction is certainly *res inter alios acta*, and it is not unknown for the receiver's wife to have given evidence for the Crown at the thief's trial. When this has occurred, it would be an indirect violation of the rule that she is not a competent witness for the prosecution on the receiving charge to admit the thief's conviction as evidence against her husband. On the other hand, *Hollington v. Hewthorn* was solely concerned with the admissibility of a conviction in a civil case and this fact might enable a court to draw a distinction between that case and the criminal proceedings to which reference has just been made, even if there is no rhyme or reason in the distinction.

Granted that some reform of the present English law is desirable, does rule 63 (20) go far enough for our purposes? It is submitted that it does not, if only because the exception is confined to convictions of felony. Rule 521 of the American Law Institute's Model Code of Evidence provides that a subsisting judgment adjudging a person guilty of a crime or a misdemeanour is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment. The reason given in the comment on the Uniform Rules for the restrictive nature of rule 63 (20) is that "trials and convictions in traffic courts and possibly in misdemeanour cases generally often do not have about them the tags of trustworthiness as they are often the result of expediency or compromise. To let in evidence of a conviction of a traffic violation to prove negligence and responsibility in a civil case would seem to be going too far." Whatever plausibility these observations may have with regard to the United States, it would certainly be wrong to assume that convictions in England for the kind of traffic offence that is likely to lead to civil litigation (dangerous and careless driving) do not "have about them the tags of trustworthiness." Accordingly it is submitted that a conviction for any offence should be admissible evidence of the facts on which it was founded in all cases in which it does not operate as an estoppel. Even this provision would still not go far enough for, under the present English law, a judgment in a civil action is inadmissible as evidence of the facts on which it was based. In fact the most costly effect of *Hollington v. Hewthorn* from the point of view of the litigants in subsequent cases was that, where H has divorced W on the ground of her adultery with C, the decree nisi is inadmissible as evidence of C's adultery with W in divorce proceedings brought on that ground by Mrs. C. A reversion to the law on this point as

it was supposed to be before *Hollington v. Hewthorn* is recommended by the Royal Commission on Divorce and had been recommended by the earlier Denning Committee on Procedure in Matrimonial Causes. There seems to be no reason why all judgments in civil cases should not be admissible evidence of the facts on which they were based except where they operate as an estoppel. Accordingly it is submitted that, under an exception to the rule against hearsay and without prejudice to the law of estoppel, the judgment of any civil court or the conviction of any criminal court should be admissible to prove any fact essential to sustain such judgment or conviction.⁶¹

OTHER DESIRABLE REFORMS

Lest it should be thought that the foregoing discussion has covered all the possibilities of reform in the law of evidence, some further examples may be briefly mentioned. There seems to be a good case for enabling children to give their evidence unsworn in civil cases as they can at all criminal trials under section 38 of the Children and Young Persons Act, 1933. Under the present law, if a girl of fifteen applies for an affiliation order her sworn evidence cannot be corroborated by the unsworn testimony of her sister of nine, but such testimony may corroborate the girl's evidence if the father is charged with having had unlawful carnal knowledge of her. Mention of corroboration leads on to the suggestion that the time may have come for the adoption of a recommendation made by a departmental committee as long ago as 1925 that, on charges of indecency against child A, child B's evidence of a different incident in which the accused committed indecency against him or her should be corroborative of A's evidence. The mention of the recommendation of a departmental committee leads one to ask whether it is not time that effect was given to the recommendations with regard to evidence of the Royal Commission on Divorce.⁶² Would it not be possible to save time at a criminal trial if formal admissions might sometimes be made by or on behalf of the accused? ⁶³ Is the present method of taking evidence from expert

⁶¹ Some would advocate an express provision that the burden of disproving the facts on which the original judgment was founded should be placed, in the subsequent proceedings, on the person against whom the judgment was given. Others would discriminate between convictions of superior and inferior courts, the latter only being admissible in subsequent proceedings at the judge's discretion.

⁶² (1956) Cmd. 9678. The recommendations include the admissibility of findings of adultery, rape and bigamy, as evidence of those facts in subsequent matrimonial proceedings, the creation of a rebuttable presumption of adultery from the contraction of a bigamous marriage (which would save expense where the parties to the bigamous union are abroad) and the long overdue removal of the privilege against answering questions tending to show adultery in proceedings instituted in consequence of adultery, most recently attacked by Lionel Rosen, 23 M.L.R. 275.

⁶³ For example, time and money would be saved if, on such charges as causing death by dangerous driving, it was possible to serve the accused with notice

witnesses by the orthodox means of concise question and answer necessarily the best? ^{63a} Finally, if such matters properly come within the sphere of the law of evidence, is it not time that the formulation and effect of a number of presumptions was considered? Should not the statutory provisions under which the burden of proof on a number of issues in a criminal case is cast upon the accused be exhaustively re-examined? and surely it would be possible to redraft the Judges' Rules so that they do not have to be explained away in Home Office circulars.⁶⁴

A REFORM THAT CANNOT BE EFFECTED BY LEGISLATION

Legislation would be necessary to give effect to most of the reforms mentioned in this article, but there is one highly desirable reform which cannot be brought about by this means, and this is that there should be a closer approximation between the law of evidence as it is taught on the authority of the considered opinions of appellate courts with the law of evidence as it is practised in courts of first instance where decisions have to be reached on the spur of the moment. Sir Patrick Devlin has likened the contrast to that between the Queen's English and pidgin English.⁶⁵ Every practitioner must be aware of it, and one example will suffice.

Students of the law of evidence are told at an early stage in their studies that the answer to the question whether a witness's narration of someone else's statement infringes the rule against hearsay depends on the purpose for which the evidence is tendered. "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made."⁶⁶ The student is also told, on the authority of a decision of the Court for Crown Cases Reserved,⁶⁷ that the rule against hearsay applies just as much to a witness's statement of the result of inquiries made by him as it does to his narration of the answers given to his inquiries. "I made inquiries and concluded that no business was being done at 1 Any Street" is no more admissible as evidence that no business was being done than "Smith, Jones and Robinson told me that no business was done at 1 Any Street." A day in a magistrates' court might nevertheless lead the observer

of the medical evidence of death with an indication that the witnesses would not be called even at the preliminary examination if he did not wish them to attend. See also recommendation 12 of the report cited *supra*, note 22.

^{63a} So far as medical experts are concerned this matter is now under review by a joint committee of the B.M.A., Bar Council and Law Society.

⁶⁴ See the various articles in *Criminal Law Review*, May 1960.

⁶⁵ At an informal address to the Oxford University Law Society given in January, 1960.

⁶⁶ *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 665 at p. 669.

⁶⁷ *R. v. Saunders* [1899] 1 Q.B. 490.

to suppose that the rule against hearsay amounts to a total ban on the repetition by a witness of anything said by anybody else and that the rule cannot be infringed when there is no direct narration of another person's statement by the witness. It would be idle to pretend that episodes such as the following are entirely unknown: question to a police witness on a charge of larceny: What did you do at mid-day on January the first?

A. I went to the accused's house.

Q. Was the accused there?

A. No.

Q. Who was there?

A. The accused's wife.

Q. What did you do then?

A. As a result of my conversation with his wife, I went to the accused's place of work and said to him "It has come to my knowledge that you have been stealing."

If the word "hearsay" happens to be mentioned in an objection to the last answer the reply is as like as not to be one of injured innocence "But the witness has not said what he heard the accused's wife say." Nevertheless, if the objection is not upheld, the prosecution will have killed two birds with one stone with the last answer for it is both a disguised infringement of the hearsay rule and an indirect evasion of the rule that the accused's wife is an incompetent witness for the prosecution on a charge of larceny.⁶⁸

THE NEED FOR CODIFICATION

Codification of the major rules of evidence would go a long way towards bridging the gulf between this branch of the law as it is taught and as it is practised. Too much must not be expected of codification of any part of the law, but, in the case of the law of evidence, it would save time and render the subject a good deal more comprehensible than it can possibly be at the moment to the police officers and lay magistrates who are so intimately concerned with its administration. Until it is cast into the form of a rational code, there will inevitably be a large measure of truth in the following words of a contemporary practitioner concerning our law of evidence: "Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builder's

⁶⁸ Even the Court of Criminal Appeal has used words which appear to sanction a disguised infringement of the hearsay rule similar to that mentioned in the text (see *R. v. Wallwork* (1958) 42 Cr.App.R. 153, and note by the present writer, 74 L.Q.R. 353).

débris.”⁶⁹ There is a rich harvest of readily accessible material for the preparation of a rational code which could embody many of the reforms which have been mentioned.⁷⁰ Is it too much to hope that some use will be made of this material in the not too distant future?

RUPERT CROSS.*

⁶⁹ C. P. Harvey Q.C., *The Advocate's Devil*, 79.

⁷⁰ In addition to the American material (the model code, Uniform Rules and Wigmore's Code), there is much Commonwealth material, not to mention Stephen's *Digest*. Codification of the English statutes on evidence was recommended by the final report of the Evershed Committee.

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REFORM IN THE LAW OF CONTRACT

IN this paper it is proposed to consider those aspects of the law of contract that appear to demand most urgently the consideration or reconsideration of the Law Reform Committee. Of course, urgency in the context of law reform is a relative conception. The capacity of a social system to absorb injustice or inexpediency on an individual scale is very high. Relative to that capacity it is probable that none of the matters of contract to be discussed is urgent. None of them may truly be said to evoke issues of national dimensions or affecting adversely the interests of powerful social groupings, or, at least, virtually none of them. But, it is the tradition of the common law that its scale of justice is that of the individual, and it is so far as the following aspects of contract inflict injustice or great inconvenience on individual human beings that the discussion of their reform may be said to be urgent.

1. THE POWER RELATION¹

The most pressingly important problem that confronts the law today in this field is that of controlling imposed, in particular, imposed standard contracts.²

¹ Since O. C. Giles' (Prausnitz') pioneer work in England, *The Standardisation of Commercial Contracts*, this problem has attracted steadily increasing attention. See, for example, Friedmann, *Law in a Changing Society*, Chap. 4; Sales, "Standard Form Contracts," 16 M.L.R. (1953) 318; Lord Denning, "The Way of an Iconoclast" (1959) J.S.P.T.L. 77; Hughes-Parry, *The Sanctity of Contracts in English Law*, Chap. 2; Wedderburn's review article of the latter work in (1960) J.S.P.T.L. 142 and the same author's 5th edition of Sutton and Shannon on *Contracts*, pp. 304-309; Guest's 22nd edition of Anson, *Contract*, Chap. 4, IV; Gardiner, *Law in Action* (Vol. 2, 1957), *Freedom of Contract*; Cheshire and Fifoot, *Contract*, 5th ed., 107 *et seq.*; the present writer's "Passenger Charges Schemes 1952-53" (1954) 17 M.L.R., 119.

² I have, for the sake of clarity and directness of meaning, avoided the French technical phrase, *contrat d'adhésion*.

Imposed standard contracts are to be distinguished from "compulsory contracts," which is a term that straddles a number of categories of contract including imposed standard contracts. "Compulsory contracts" embrace at least three types of contractual transaction:

(i) The case where a person who wishes to engage in a particular activity is compelled to submit to a certain kind of contract whether he wishes to or not. Examples, which are few, include third-party accident insurance under the Road Traffic Act, 1930, and the employment of a quota of disabled persons by employers of 20 or more under the Disabled Persons (Employment) Acts, 1944 and 1958.

(ii) The case in which a person providing certain kinds of services is compelled to conclude contracts with those who demand such services: the common carrier and innkeeper at common law, the rail carrier under the Railway and Canal Traffic Act, 1854, s. 2.

(iii) The case in which a contract once concluded becomes subject wholly or in part to terms imposed by the law. This class of compulsory contract is, therefore, defined not by reference to the duty to form it, but by reference

The rights, liabilities, privileges and disabilities of citizens are not defined only by the law of the land. They are also subject to the terms and conditions of the contracts people conclude under the law of the land. Sometimes, a contract will be created to meet the peculiar needs of one particular transaction: it will be a highly individual or *ad hoc* contract, like the contract of employment between a company and its new general manager. But, much more frequently, the contract will be a standard contract, whether having contractual or statutory force, which the one party constantly uses, with little or no variation, in his dealings with others.

The Postmaster-General enters into a standard agreement with each householder and business that hires a telephone. The Gas and Electricity Boards issue standard contracts to their domestic and industrial consumers. Similarly, water companies use standard contracts in selling their commodity. Standard contracts of employment are commonly given to its managerial and professional employees by any sizable employer, like universities or the B.B.C., local authorities or I.C.I. Virtually all types of insurance policy, including marine, life, fire, motor-car or employers' liability, assume a standard form. The transport of goods, passengers and their luggage, whether by road, rail, air or sea, is conducted within the regulatory frame not only of statute and case law but also of standard terms and conditions. Government departments and local authorities employ uniform terms and conditions to define their relationship with outside contractors for works and supplies. Financing contracts, like contracts of loan, mortgages and guarantee, are standard; and the standard form of contract is universally employed in the transfer and definition of freehold and leasehold interests. The entire structure of wholesale and retail distribution rests in substantial part on standard contracts of sale, hire-purchase and resale price maintenance; and the standard contract is to be found at almost every turn throughout the range of services in addition to transport, from the contracts of the giant building and engineering contractors to laundering, dry-cleaning and dyeing contracts, contracts for the deposit of luggage, coats and other articles in railway or theatre or cinema cloakrooms, the contract to take a room in a metropolitan hotel. Even the constitutions of unincorporated associations, like trade unions and trade associations, are in a sense standard contracts.³

In employment, in distribution, in finance and insurance, in property transfer and holding, in the public utilities, in transport,

solely to its contents, *e.g.*, the mandatory terms of the Hire Purchase Act, 1938, and of the First Schedule to the Carriage by Air Act, 1932.

"Compulsory contracts" is a phrase of philosophical rather than technical significance, used in general jurisprudential discussion of the doctrine of freedom of contract. All types of contract subsumed under this phrase are examples of the way in which freedom to contract with whom one pleases on such terms as one pleases has, for a variety of reasons, been diminished.

³ See, especially, *Lee v. Showmen's Guild* [1952] 2 Q.B. 329.

building and other services, in the organisation of business and labour, the standard contract recurs as a vital legal instrument.

Far and away the most significant development in the use of the contract over the past hundred years has been the tremendous increase in the number of standard contracts that are in circulation. The tempo and complexity of modern life and commerce make the standard contract indispensable, as indispensable as the machine, or the division of labour, or the electrical system of communications, or the large scale of commercial, industrial and labour organisation. Through the use of standard forms of contract, substantial economies of time, effort and expense are achieved. As standard contracts are in writing, the contractual provisions governing the relationship between parties are clear and certain, subject, it is true, to problems of interpretation. And, the power which the common law principle of freedom of contract confers on parties to make their own contracts as they please, enables businessmen and employers, trade unions, central and local administrators to adapt their contractual arrangements to the actual and changing demands of their respective spheres of activity. Economy, certainty and adaptability are the three outstanding virtues of the standard contract.

But, always coiled in power is its abuse; and contractual power is no exception. Not invariably,⁴ but usually, the freedom to contract through standard terms and conditions is that of one party only. Though such contracts contain terms shaped simply to meet the practical needs of the transaction concerned, they also include clauses, few or many, simple or complicated, that confer decided legal as well as other advantages upon the party who is in a position to insert them. Purely economic clauses, operational clauses and, in particular, exemption clauses⁵ may thus be imposed by the party of the stronger on the party of the weaker contracting position.

Before new statutory measures to govern such contracts may be discussed, the existing state of legal regulation must be defined. Therefore, as a necessary prologue to proposals for reform, there follows a survey of the control of imposed contracts by the law at the present time.

LEGISLATIVE CONTROL

The regulation by the law of imposed standard contracts has paralleled their emergence and growth. But, the manner of control, whether legislative or judicial, has up to the present time been consistently piecemeal.

With the legislation we are not here principally concerned. Employment and transport, in particular, have attracted statutory

⁴ For example, the Lloyd's marine policies.

⁵ The use of the phrase, "exemption clause" is merely a personal preference. Synonymous phrases are, "exception clause," "exemptive clause," "exculpatory clause," "exempting clause."

regulation of contract: in the former, for example, the Truck Acts, 1831-96, the Solicitors Act, 1932, s. 60 (2), and the entire corpus of minimum wage and maximum hours legislation⁶; in the latter, the Carriers Act, 1830, Railway and Canal Traffic Act, 1854, s. 7, Carriage of Goods by Sea Act, 1924, Carriage by Air Act, 1932, Road Traffic Act, 1930, s. 97, British Transport Commission (Passenger Charges) Scheme, 1954, paras. 32-33. Again, in financing, there are the Moneylenders Act, 1927, and the Building Societies Act, 1939, s. 14; in property holding, the Agricultural Holdings Act, 1948, and Agriculture Act, 1958, and the Rent Acts; in distribution, the Hire Purchase Acts, 1938-54; in business organisation, the Partnership Act, 1890, and current Companies Act; while the statutory schemes for the nationalised public utilities and rail transport industries included an experiment with consumers' consultative committees.

JUDICIAL CONTROL

In the vast area of contract left untouched by statute, the courts have gradually created a series of independent rules which, in sum total, exert an extensive but still imperfect control over contracts or contractual clauses imposed by parties who occupy dominant bargaining positions.

The controlling rules of case law apply their influence in two main ways. Some deny the valid formation of a contract at all; the others deny the legal effect argued for a particular clause or particular clauses in a contract.

The first set of rules includes the doctrine of duress and undue influence, equitable "surprise"⁷ and "unfair advantage,"⁸ the *non est factum* rule and the recent distinction between a signed admission and a signed contract in *Lowe v. Lombank*.⁹

The second set of rules is much more important in practice. An attempt to contract out of liability for fraud would founder on the rock of public policy.¹⁰ A clog on the equity of redemption, however clearly drafted, is controlled. An imposed exemption clause in a standard contract will be cut down by misleading statements in the "zone of negotiations," whether such statements take the form of a promise-warranty¹¹ or mere misrepresentation.¹²

⁶ Compare too the Law Reform (Personal Injuries) Act, 1948, s. 1 (3).

⁷ e.g., *Evans v. Llewellyn* (1787) 2 Bro.C.C. 150; *Williams v. Williams* (1809-10), 16 Ves. 72.

⁸ e.g., *Wood v. Abney* (1818) 3 Madd. 417; *Fry v. Lane* (1888) 40 Ch.D. 312; and, in particular, *O'Rorke v. Bolingbroke* (1877) 2 App.Cas. 814, 823 (per Lord Hatherley).

⁹ [1960] 1 W.L.R. 196.

¹⁰ Cf. agreement to commit a fraud: *Berg v. Sadler and Moore* [1937] 2 K.B. 158.

¹¹ e.g., *Couchman v. Hill* [1947] K.B. 554; *Harling v. Eddy* [1951] 2 K.B. 739; *Webster v. Higgin* [1948] 2 All E.R. 127; *S.S. Ardennes (Cargo Owners) v. Ardennes (Owners)* [1951] 1 K.B. 55.

¹² *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805.

Such a clause might also be nullified if its form of presentation is misleading or tricky.¹³ Not only will a restraint of trade clause in a contract of employment fail if it offends the cardinal principle of voluntary employment because its sole aim is to prohibit the ex-employee from competing, not only will such a clause fail because its purpose is to protect quasi-property interests of the employer but on an unreasonably wide scale, but the courts refuse to save an unreasonably wide clause by the application of the severance rule because the contract of employment, when concluded between individual employer and employee, is regarded as a contract distorted by inequality of bargaining power.¹⁴

The field of restraint of trade is not the only one in which the courts apply a "rule of reason" against the unjust consequences of imposed contracts. They apply it also through the doctrine of penalties to liquidated damages clauses,¹⁵ to which I shall return later, and to contracts which *prima facie* bind an infant, like contracts for necessities and contracts of employment. Such infants' contracts will not be enforced if it is considered that they are not on the whole for the infant's benefit, which means, in effect, that they contain clauses that are over-onerous, that is to say, unreasonable in relation to the infant party.¹⁶ Even the doctrine of privity of contract has a not unbeneficial function in those cases in which it deprives the agent or servant of the protection of exemption clauses imposed by the principal or master.¹⁷

There are three additional rules to mention. They are taken together because they are interconnected. They are the rule of interpretation *contra proferentem*, the rule that the defendant must have done what he contracted to do, and the doctrine of fundamental breach.

REGULATION THROUGH INTERPRETATION

"No principle is more firmly settled than that, when one is construing exceptions to the general liability of a carrier or a bailee, those exceptions are to be construed strictly, so that if a word is capable of bearing two meanings, the narrower meaning should be adopted."¹⁸ This principle of what may be called regulative interpretation is not only applied to contracts of carriage and bailment, but to all contracts.

¹³ Cf. *Roe v. Naylor* [1917] 1 K.B. 712; (1918) 87 L.J.K.B. 958; *Spurling v. Bradshaw* [1956] 1 W.L.R. 461, 466 (*per* Denning L.J.).

¹⁴ See, especially, Marsh, "Severance of Illegality in Contract" (1948) 64 L.Q.R. 230, 347.

¹⁵ At least, in relation to individual resale price maintenance and hire-purchase minimum payment clauses.

¹⁶ *Fawcett v. Smethurst* (1914) 84 L.J.K.B. 473; *De Francesco v. Barnum* (1890) 45 Ch.D. 430; *Flower v. L.N.W. Ry.* [1894] 2 Q.B. 65.

¹⁷ *Adler v. Dickson* [1955] 1 Q.B. 158; *Midland Silicones v. Scruttons* [1959] 2 Q.B. 171; [1960] 2 All E.R. 737; *Wilkie v. L.P.T.B.* [1947] 1 All E.R. 258.

¹⁸ *Alexander v. R.E.* [1951] 2 K.B. 882, 893 (*per* Devlin J., as he then was). Cf., too, the rule that written clauses take precedence over printed.

If an imposed clause is plainly ambiguous or proves, under the judicial probe, to be capable of ambiguity, the clause may be regulated through the power of interpretation. Numerous examples of the exercise of this power occur in the reports. There are the cases of alternative standards of care and forms of liability in carriage by road and rail,¹⁹ and in the subtle decision of *White v. Warwick*.²⁰ There is the famous line of sale of goods cases, *Wallis v. Pratt*,²¹ *Baldry v. Marshall*,²² *Andrews v. Singer Motors*,²³ and the equally famous series of estate agent commission note cases.²⁴ There are the immensely important decisions in which the courts have, by interpretation *contra proferentem*, controlled the expulsion of the individual from his trade union.²⁵ But the limitation of the *contra proferentem* rule requires no emphasis. If the imposed clause is unambiguous, the power to regulate in this way fails: *L'Estrange v. Graucob* ²⁶ marks the spot.

THE PRINCIPLE IN GIBAUD'S CASE

The rule that the defendant must have done what he contracted to do and its restatement and extension, the doctrine of fundamental breach, take over where the principle of regulative interpretation falters.

The first of these rules was described by Scrutton L.J. in *Gibaud v. Great Eastern Ry.*²⁷; "The principle is well known, and perhaps *Lilley v. Doubleday* ²⁸ is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it."²⁹ What may be called, for the sake of brevity, the principle in *Gibaud's* case is "common to all classes of contract."³⁰

The *contra proferentem* rule applies to contractual clauses

¹⁹ See, e.g., *Steinman v. Angier Line* [1891] 1 Q.B. 619, 623; *Rutter v. Palmer* [1922] 2 K.B. 87, 90; *Turner v. Civil Service Supply Assn.* [1926] 1 K.B. 50; *Bontex Knitting Works Ltd. v. St. John's Garage* [1943] 2 All E.R. 690. [1944] 1 All E.R. 387; *Harling v. Eddy*, *supra*; *Alexander v. R.E.*, *supra* 892-893. Cf. *Woolmer v. Delmer Price Ltd.* [1955] 1 Q.B. 291, where the ambiguity lay in the facts and not in the exemption clause.

²⁰ [1953] 1 W.L.R. 1285.

²¹ [1911] A.C. 394.

²² [1925] 1 K.B. 260.

²³ [1934] 1 K.B. 17.

²⁴ See Gower, "Estate Agent's Commission" (1950) 13 M.L.R. 491. Most recently, *Ackroyd v. Hasan* [1959] 1 W.L.R. 706 (at first instance).

²⁵ See *Braithwaite v. Amalgamated Society of Carpenters* [1922] 2 A.C. 440.

²⁶ [1934] 2 K.B. 394. See also *Drewery v. Ware-Lane* [1960] 1 W.L.R. 1204.

²⁷ [1921] 2 K.B. 426.

²⁸ (1881) 7 Q.B.D. 510.

²⁹ *Supra*, at p. 435.

³⁰ *The Cap Palos* [1921] P. 458, 471 (*per* Atkin L.J.).

generally, whether economic clauses as in estate agent commission notes, or operational clauses as in trade union rule books, as well as exemption clauses. The principle in *Gibaud's* case, on the other hand, governs only exemption clauses covering the defendant in respect of breaches of contract. The scope and limits of the principle may be most clearly indicated contractual transaction by contractual transaction.

The contractual transactions in which the principle in *Gibaud* has been applied divide into two large categories, that of services and that of distribution and use of goods through sale and hire-purchase.

(a) *Contracts for Services*

The contracts for services include, to date, the deposit of goods, the carriage of goods by land and sea, laundering and dry-cleaning, and towage. The first three are, of course, aspects of the general institution of bailment.

In the case of the bailment contract, the principle in *Gibaud* is sometimes expressed as follows: "a bailee who comports himself in a manner utterly repugnant to the terms of a bailment terminates the bailment and thereupon the right to possession reverts in the bailor."³¹ Thus, when goods are deposited for safe keeping with a bailee for reward, the bailee loses the protection of any express exemption clause covering wilful misconduct or negligence, limitation of damages, or any other subject-matter, if the goods are lost, destroyed or damaged because stored in a place other than the one agreed upon,³² or because the bailee allows an unauthorised third person to break into the goods,³³ or the bailee sells the goods by mistake or otherwise wrongfully to a third party,³⁴ or delivers them, without excuse, to the wrong person,³⁵ or himself consumes or destroys the goods instead of storing them.³⁶

Two points arising from deposit-bailment deserve further comment. The obligation in respect of storage is fundamental, not absolutely, but only relative to the terms of the contract: in other words, the obligation may be varied by express contract so as to

³¹ *N. Central Wagon and Finance Co. Ltd. v. Graham* [1950] 2 K.B. 7, 11; *Alexander v. R.E.*, *supra*, 888.

³² *Lilley v. Doubleday*, *supra*; *Woolmer v. Delmer Price Ltd.* [1955] 1 Q.B. 291, 295; *Spurling v. Bradshaw*, *supra*, 465, 469; see too, *Edwards v. Newland* [1950] 1 All E.R. 1072. "The only exception . . . to this general rule is where the destruction of the goods must take place as inevitably at one place as the other": *Lilley v. Doubleday*, *supra*, 511. See, too, the carriage case, *Davis v. Garrett* (1830) 6 Bing. 716, 723. Dist. *Gibaud v. G.E. Ry.*, *supra*.

³³ *Alexander v. R.E.*, *supra*, 888-889.

³⁴ *Woolmer v. Delmer Price*, *supra*, 295; *Spurling v. Bradshaw*, *supra*, 465. Cf. wrongful sale by hire-purchaser: *N. Central Wagon and Finance Co. Ltd. v. Graham*, *supra*.

³⁵ *Alexander v. R.E.*, *supra*; *Spurling v. Bradshaw*, *supra*, 465; Qu.: whether *Ashby v. Tolhurst* [1937] 2 K.B. 242 is out of line with the post-war development? But see the reference to merely negligent or inadvertent misdelivery in *Sze Hai Tong Bank v. Rambler Cycle Co.* [1959] A.C. 576, 581.

³⁶ *Spurling v. Bradshaw*, *supra*, 465, 470 (simple failure to redeliver).

permit a sub-bailment, here, storage on premises not of the bailee but of a third party.³⁷ The second point is, in Lord Denning's words, that "negligence by itself, without more, is not a breach which goes to the root of the contract."³⁸ But this refers to negligence which, as in *Spurling v. Bradshaw*, occurs in the course of contractual performance, not negligence which, as in wrongful sale, occurs when "the bailee . . . comports himself in a manner utterly repugnant to the terms of the bailment," i.e., outside the course of contractual performance.³⁹ This distinction is further illustrated in the towage cases, which will be mentioned shortly. On the other hand, in contracts for services, gross negligence or reckless indifference, though in the course of contractual performance, may be subject to the doctrine of fundamental breach, as will be indicated later.

Taking carriage of goods by sea and land together, deviation from the agreed route or, where none was agreed, the customary route, has long been held to be a fundamental breach of the contract of carriage and to deprive exemption clauses of their effect⁴⁰; though deviation is permissible, of course, where the contract contains a deviation clause like that in *Connolly Shaw v. A/S Deb Nordenfjeldske D/S*.⁴¹ Breach of the implied warranty of seaworthiness, while it does not nullify the express contract of affreightment *in toto* as unjustifiable deviation does, nevertheless nullifies the exemption clauses, including time limits on claims⁴² and limited damages clauses⁴³: "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship."⁴⁴ But, this rule is subject to two qualifications: first, the warranty of seaworthiness may be displaced by a blanket clause against liability for breach of such warranty, and, second, the rule regarding breach of the implied warranty of seaworthiness does not apply, strangely, to breach of an *express* warranty of seaworthiness.⁴⁵

³⁷ *Woolmer v. Delmer Price*, *supra*, 295. See, also, the dry cleaning case, *Davies v. Collins* [1945] 1 All E.R. 247, 249, 251.

³⁸ *Spurling v. Bradshaw*, *supra*, 465.

³⁹ Cf. Lord Greene M.R., in the laundering case, *Alderslade v. Hendon Laundry* [1945] K.B. 189, 193: "What I may call the hard core of the contract, the real thing to which the contract is directed, is the obligation . . . to launder. That is the primary obligation. It is the contractual obligation which must be performed according to its terms, and no question of taking due care enters into it."

⁴⁰ e.g., *Davis v. Garrett*, *supra*; *Mallett v. G.E. Ry.* [1899] 1 Q.B. 309. Generally, Scrutton, *Charterparties*, 16th ed., 297 *et seq.* An arbitration clause is not, of course, affected.

⁴¹ (1934) 49 Ll.L.R. 183, such clauses being strictly construed *contra proferentem*.

⁴² *Tattersall v. National S.S. Co.* (1884) 12 Q.B.D. 297.

⁴³ *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co.* [1922] 2 A.C. 250; also, *Bank of Australasia v. Clan Line* [1916] 1 K.B. 39, 40-43 (Bailhache J. at first instance).

⁴⁴ *Atlantic Shipping and Trading Co. v. Dreyfus*, *supra*, 260 (per Lord Sumner).

⁴⁵ See Scrutton, *op. cit.* 103, note (i).

Further to the carriage of goods, express exemption clauses are displaced by conduct in the course of transit, like extremely unreasonable delay, which bears an analogy to deviation.⁴⁶ Exemption clauses may also be nullified by carrying the goods in a vehicle other than that agreed on,⁴⁷ or to a destination other than that agreed on,⁴⁸ or by delivering to the wrong person.⁴⁹

On the other hand, it was not a fundamental breach when the carrier negligently failed to notify the consignee, in accordance with the contract of carriage, of the arrival of perishables (bananas) with the result that they were seriously damaged in the meantime by the climate.⁵⁰ The contractual provision requiring notice of arrival within a reasonable time was classified as "merely an ancillary provision not bearing upon the contract of carriage at all."⁵¹ Also, the consignee had had a choice of carrier's risk and owner's risk rates and had freely chosen the latter.⁵²

Turning to laundering and cleaning services, *Davies v. Collins*⁵³ makes it clear that, if the contract itself and other material surrounding circumstances show that the customer committed his clothes to the care of the launderers or cleaners personally, sub-contracting⁵⁴ the work, since it vastly extends the area of agreed risk for the customer, is a breach of contract that cuts down express exemption clauses. The principle in *Gibaud's* case was re-expressed in *Alderslade v. Hendon Laundry*, as approved in *Davies'* case, as follows: "a limitation clause of this kind only applies where the damage in respect of which the limitation clause is operative takes place within the four corners of the contract. A contracting party who goes outside his contract cannot rely upon the clause if the loss occurs during operations outside the contract, as distinct from operations which the contract contemplates."⁵⁵

⁴⁶ *Cunard S.S. Co v. Buerger* [1927] A.C. 1; *Bontex Knitting Works Ltd. v. St. John's Garage* [1943] 2 All E.R. 690.

⁴⁷ *Gunyon v. S.E. & C. Ry.* [1915] 2 K.B. 370; *Garnett v. Willan* (1821) 5 B. & Ald. 53; *Sleat v. Fagg* (1822) 5 B. & Ald. 342; *Davies v. Garrett*, *supra* (wrong conveyance by mistake).

⁴⁸ *L.N.W. Ry. v. Neilson* [1922] 2 A.C. 263. Dist. *Renton v. Palmyra Trading Co.* [1957] A.C. 149.

⁴⁹ *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co.*, *supra* (also, the dictum about burning and throwing into the sea, at 587). *Quaere*, the validity today of *Smackman v. General Steam Navigation Co.* (1908) 13 Com.Cas. 196, in connection with which the dictum about misdelivery in *The Albion* [1953] 2 All E.R. 679 at 682 should be marked. Note, however, the "special circumstances" cases like *British Traders Ltd. v. Ubique Transport Ltd.* [1952] 2 Ll.L.R. 236.

⁵⁰ *Hartstoke Fruiterers Ltd. v. L.M.S. Ry.* [1943] 1 All E.R. 470.

⁵¹ At 472.

⁵² At 473.

⁵³ *Supra*.

⁵⁴ There is, of course, nothing to prevent the customer agreeing to sub-contract: *Davies v. Collins*, *supra*, 249, 251. A sub-bailment may also be reasonable in the circumstances of the transaction, *i.e.*, may be impliedly agreed: *Edwards v. Newland*, *supra*, 1081.

⁵⁵ In [1945] 1 All E.R. 244, 245 (the second sentence quoted is omitted from the report in [1945] K.B. 189, 192, possibly because it merely amplifies but does not add). Approved in *Davies*, *supra*, at 249.

On the other hand, it would not be outside the course of contractual performance if it were necessary to sub-contract "an ancillary service," such as sending the goods back to the customer through the Post Office or other independent carrier.⁵⁶

Finally, in respect of towage contracts, following on the principles discussed above, while it was held in *The Albion*⁵⁷ that an exemption clause covered negligence in the course of performing the towage contract, in *The Cap Palos*,⁵⁸ the clause was held ineffective where the injuring act, inadvertence, mistake or miscalculation, took place outside the course of contractual performance.

(b) *Contracts of Sale and Hire-Purchase*

I have tried so far to analyse the contracts for services exclusively in terms of the principle in *Gibaud's* case, though, unavoidably, since the development of the two doctrines has overlapped in time, the language of fundamental breach has crept in. Likewise, I shall try to keep the two distinct in discussing contracts of sale and hire-purchase in order the better to stress later on the legal development that appears to have occurred actually and potentially by reason of consolidating the principle in *Gibaud* in the doctrine of fundamental breach.

In sale and hire-purchase decisions, the principle in *Gibaud's* case has been activated either in the case of the seller failing to transfer good title or where the seller has delivered goods other than those contracted for.

As to the former type of case, there is simply the decision in *Rowland v. Divall*.⁵⁹ As to the latter, however, we may begin with *Shepherd v. Kain*,⁶⁰ where a "with all faults" clause went by the board because the ship delivered was only partially copper-fastened and not a "copper-fastened vessel" as described in the contract. It would be the same, the Court of King's Bench pointed out, if a silver service were sold and turned out on delivery to be plated.⁶¹ Then, we have Lord Abinger's celebrated dictum that, "if a man offers to buy peas of another, and he sends him beans, he does not perform his contract": it is "a non-compliance with a contract which a party has engaged to fulfil."⁶²

Later, we can draw on *Pinnock v. Lewis*,⁶³ where, in a contract for copra cake, copra cake mixed with castor beans was held to be "a substance quite different from that contracted for."⁶⁴ More recently, there were *Andrews v. Singer Motors*⁶⁵ and *Nicholson and*

⁵⁶ See *Alderslade* [1945] K.B. 189, 193; *Davies*, *supra*, 251.

⁵⁷ *Supra*.

⁵⁸ *Supra*.

⁵⁹ [1923] 2 K.B. 500.

⁶⁰ (1821) 5 B. & Ald. 240.

⁶¹ *Ibid*.

⁶² *Chanter v. Hopkins* (1838) 4 M. & W. 399, 404.

⁶³ [1923] 1 K.B. 690.

⁶⁴ At 696-697.

⁶⁵ [1934] 1 K.B. 17.

Venn v. Smith Marriott,⁶⁶ which, although decided by applying the *contra proferentem* rule to their respective exemption clauses, might have arrived at the same conclusion by holding the clauses displaced because, in the one, a non-new Singer car was delivered instead of a new one as agreed,⁶⁷ while, in the other, Georgian linen was sold instead of the Caroline linen offered. Indeed, it is plainly implicit in the logic of the principle in *Gibaud*, or the rule of repugnancy, whichever one chooses to call it here, that breach of the promise, express or implied, to deliver the goods of contract description could not be neutralised by any exemption clause, not even the comprehensive *L'Estrange v. Graucob* clause.

The most recent continuation of these cases brings us to the doctrine of fundamental breach and will be considered under that heading.

THE DOCTRINE OF FUNDAMENTAL BREACH

The principle in *Gibaud's* case might have been regarded as a special way of interpreting the sense of a contract: in this aspect, it looked back to the principle of regulative interpretation. It might, on the other hand, have been regarded as erecting a barrier beyond which exemption clauses, however crystal clear, may not operate: in this aspect, it looked forward to the doctrine of fundamental breach.

Before 1951, the principle in *Gibaud's* case was, as we have seen, sometimes referred to as involving a fundamental breach of contract, for example, in the deviation and towage cases. Since 1951, that is to say, since *Alexander v. Railway Executive*,⁶⁸ the principle has plainly been restated in the form of the doctrine of fundamental breach, into which it has been absorbed. This process of absorption and restatement has not, however, been merely a substitution of one label or one set of words for another. The doctrine of fundamental breach is an extension as well as a restatement of the principle in *Gibaud's* case. The very phrase, "fundamental breach," suggests a vaguer and, therefore, wider scope than the phrase, "not doing what one has contracted to do." How, then, has this wider "feeling" been translated by the courts into concrete terms? And, what appear to be its potentialities?

The doctrine of fundamental breach has been described in a wide variety of expressions, all of which have the same meaning, whatever that may be. It has been referred to, simply, as a "fundamental breach of contract,"⁶⁹ or as a "breach" or

⁶⁶ (1947) 177 L.T. 189.

⁶⁷ See *Karsales (Harrow) Ltd. v. Wallis* [1956] 1 W.L.R. 936, 943-944 (*per Parker L.J.*, as he then was); also, Benjamin, *Sale*, 8th ed., 622-623. Cf. *Morris Motors Ltd. v. Lilley* [1959] 3 All E.R. 737.

⁶⁸ *Supra*.

⁶⁹ *Alexander v. R.E.*, *supra*, 888-889; *Woolmer v. Delmer Price*, *supra*, 295.

"fundamental breach which went to the root of the contract,"⁷⁰ or as a "breach of a fundamental term"⁷¹ or "breach of a fundamental term which is in the nature of a deviation,"⁷² or "akin to a deviation,"⁷³ or as "a radical breach,"⁷⁴ or a breach which "goes outside the contract,"⁷⁵ or a violation of "the essence of the contract,"⁷⁶ or of "the main object and intent of the contract,"⁷⁷ or of "one of the prime obligations of the contract,"⁷⁸ or of a "fundamental contractual obligation,"⁷⁹ or of "one of its main objects,"⁸⁰ or as a failure to perform a contract "in its essential respects,"⁸¹ or, finally—and this sounds a special note on which more must later be said—a breach which "evinces a *deliberate* disregard of . . . bounden obligations."⁸²

Even Devlin L.J.'s tentative definition in *Smeaton Hanscomb v. Setty*, at first sight more definite, leaves one, on closer inspection, equally in the semi-dark. The learned Lord Justice said: "I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates."⁸³

The doctrine of fundamental breach has already been criticised on the ground of its uncertainty.⁸⁴ Before attempting to indicate the possible line of legal development through the idea of fundamental breach, a word about the importance of uncertainty in case law⁸⁵ may not be out of place.

Legal rules and principles are of three kinds. There are the rules and principles that are certain, the rules and principles that are uncertain, not deliberately but through the accident of insufficient litigation, and the rules and principles that are uncertain by design. This third class is, in a sense, the most

⁷⁰ *N. Central Wagon & Finance Co. v. Graham*, *supra*, 15; *Karsales (Harrow) Ltd. v. Wallis*, *supra*, 940, 941; *The Albion*, *supra*, 682; *Alexander v. R.E.*, *supra*, 887; *Spurling v. Bradshaw*, *supra*, 465.

⁷¹ *Alexander v. R.E.*, *supra*, 888; *Smeaton Hanscomb v. Setty* [1953] 1 W.L.R. 1468, 1470; *Karsales (Harrow) Ltd. v. Wallis*, *supra*, 941.

⁷² *The Albion*, *supra*, 683.

⁷³ *Spurling v. Bradshaw*, *supra*, 469.

⁷⁴ *Spurling v. Bradshaw*, *supra*, 465.

⁷⁵ *Davies v. Collins*, *supra*, 249; *Alderslade v. Hendon Laundry* [1945] 1 All E.R. 245. Cf. *Hartstoke Fruiterers v. L.M.S.*, *supra*, 472.

⁷⁶ *Spurling v. Bradshaw*, *supra*, 465.

⁷⁷ *Sze Hai Tong Bank v. Rambler Cycle Co.*, *supra*, 587.

⁷⁸ *Ibid.*

⁷⁹ *Karsales (Harrow) Ltd. v. Wallis*, *supra*, 941.

⁸⁰ *Sze Hai Tong Bank v. Rambler Cycle Co.*, *supra*, 587.

⁸¹ *Karsales (Harrow) Ltd. v. Wallis*, *supra*, 940.

⁸² *Sze Hai Tong Bank v. Rambler Cycle Co.*, *supra*, 587 (*italics added*).

⁸³ *Supra*, at 1470.

⁸⁴ Unger, "The Doctrine of the Fundamental Term" (1957) 4 *Business Law Review* 30, 38.

⁸⁵ A similar analysis might be applied to statute law.

important class of all, and the rules and principles composing it may properly be described as formulae of judicial discretion.

The primary axiom of the formula of judicial discretion may be stated thus: the formulation of a principle that has no meaning in itself maximises the flexibility of the law. Where there is some uncertainty, there is some flexibility, and where the uncertainty is total, the flexibility is commensurate. Or, to put it the other way round; rigid law is dead law; to be viable, law must be flexible; flexibility is the function of uncertainty.

Uncertainty is often spoken of as though it was a legal vice. It may be where the uncertainty is undeliberate, but it is nothing of the sort where the uncertainty underlies a formula of judicial discretion. Uncertainty in law may be regrettable, but it is a regrettable necessity. No major step forward in case law development is ever taken without it.

The law abounds in examples of the importance of uncertainty, that is to say, of flexibility, that is to say, of judicial discretion. Confining oneself to the law of contract, there is, for instance, the fruitful area of uncertainty within the doctrine of consideration resulting from its highly abstract concepts of "benefit," "detriment" and "reality." There is, again, the doctrine of the implied term based on a judiciously elastic notion of "business efficacy," which has enabled the courts to write justice and commercial expediency into many types of contract, as well as deny them to others.⁸⁶ There is, further, the doctrine of public policy, the heads of which must never close, and the rules governing the legal consequences of illegal contracts which comprise a veritable network of formulae of judicial discretion. One may also refer to the doctrine of frustration proper, as distinct from subsequent physical or legal impossibility, and to the principle of "interpretation," which is to be found, in relation to statutes, in the doctrine of illegality, and, in relation to promises, in the doctrine of frustration. Such areas of judicial discretion⁸⁷ are strategic areas in the law of contract. To them has now been added the doctrine of fundamental breach. What, then, is the nature of and possibilities inherent in this new formula of judicial discretion?

First, the doctrine of fundamental breach is an absorption and restatement of the principle of the fundamental obligation to do what one has contracted to do, the principle in *Gibaud's* case. Therefore, the new doctrine collects together and includes all those applications of the principle in *Gibaud* that have already been enumerated. That the doctrine is regarded in the courts as separate from and, so, in the light of subsequent developments, an extension

⁸⁶ I have in mind *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555.

⁸⁷ Naturally, these formulae of judicial discretion are always employed very cautiously, manifesting that tension between repetition and innovation that underlies the judicial process on its purely legal side.

of the older principle may be seen in this passage from the judgment of Denning L.J. (as he then was) in *Spurling v. Bradshaw*: "These exempting clauses are nowadays all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it."⁸⁸ Just how the extension may take place is far from certain, but some indications already appear in the cases which suggest, to begin with, two possible points of departure.

(a) *Wilful or Reckless Breach of Contract*

Although "negligence by itself, without more, is not a breach which goes to the root of the contract,"⁸⁹ the same may not be true of reckless or wilful misconduct⁹⁰: "If a warehouseman were to handle the goods so roughly as to warrant the inference that he was reckless and indifferent to their safety, he would . . . be guilty of a breach going to the root of the contract and could not rely on the exempting clause. He cannot be allowed to escape from his obligation by saying to himself: 'I am not going to trouble about these goods because I am covered by an exempting clause.'"⁹¹ And, again: "it is now settled that exempting clauses . . . no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations."⁹²

These passages suggest that reckless or wilful misconduct may amount to a fundamental breach; even if the obligation so broken is not fundamental *per se*. Thus, if a warehouseman, on the evidence, recklessly left a defective carboy of acid on a shelf over a consignment of fabrics, which were in consequence badly damaged, the warehouseman might be denied the protection of his comprehensive exemption clause.

The dicta above occur in cases of bailment. But, the doctrine of fundamental breach is of universal application, and, in principle, what applies to services may also be applied to the sale and use of goods. So, a vendor who, on the evidence, delivers goods he

⁸⁸ *Supra*, at 465 (italics added).

⁸⁹ *Spurling v. Bradshaw*, *supra*, 465. Cf. too *Sze Hai Tong Bank v. Rambler Cycle*, *supra*, 589.

⁹⁰ Compare the system of duties and of liability in the Warsaw Convention (Carriage by Air Act, 1932, Sched. I), and in the Standard Terms and Conditions for the carriage of goods by rail (Kahn-Freund, *Inland Transport Law*, 3rd ed., Part 2).

⁹¹ *Spurling v. Bradshaw*, *supra*, 466. See also *Sze Hai Tong Bank v. Rambler Cycle*, *supra*, especially at 587-588. But, see *The Cap Palos*, *supra*, at 471-472: "I am far from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default"—an obsolete view, unless the clause is actually brought to the subordinate party's attention and expressly agreed by him?

⁹² *Karsales (Harrow) Ltd. v. Wallis*, *supra*, 940.

knows to be of defective quality, may find himself deprived of the protection even of a *L'Estrange v. Graucob* clause.

(b) *Goods: Description and Vital Quality*

The other visible possibility in the development of the doctrine of fundamental breach lies in the field of sale and hire-purchase of goods.

We have seen that sellers have already been held incapable of circumventing by contract their fundamental obligations to transfer the title to and description of goods contracted for. In the contracts of sale and hire-purchase of goods, the transition from the language and idea of the principle in *Gibaud's* case to that of fundamental breach began with the well-known dictum of Devlin L.J. in *Smeaton Hanscomb v. Setty*: "It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract. . . . If, for example, instead of delivering mahogany logs the sellers delivered pine logs, and the buyers inadvertently omitted to have them examined for fourteen days, it might well be that the sellers could not rely on the time clause."⁹³

In *Karsales (Harrow) Ltd. v. Wallis*, the transition was carried a stage further, if not completed. Judgment there was given in terms of both the principle in *Gibaud* and the doctrine of fundamental breach.

A second-hand Buick car in sound, running order was inspected and approved by the buyer who concluded a hire-purchase contract at a price of about £600. On delivery, he found (*inter alia*) that the new tyres had been replaced by old ones, the cylinder head was off, the valves burnt and two pistons broken; the car, in short, would not go without some £150 worth of repairs. The finance company, in their action against the hire-purchaser to enforce his contract, relied on an exemption clause which ran: "No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein." It is worth underlining that, in respect of the condition of the vehicle and its fitness for its purpose, this clause was arguably just as wide as that in *L'Estrange v. Graucob*. Held: the clause did not protect the hire-purchase company. The exemption clause was displaced by the fact that "what was delivered was not what was contracted for,"⁹⁴ that there had been a "breach of a fundamental term."⁹⁵

The Sale of Goods Act, 1893, codified a branch of case law on which *laissez-faire* and freedom of contract were writ large. But,

⁹³ *Supra*, at 1470.

⁹⁴ *Supra*, at 943.

⁹⁵ *Ibid.*

as we have seen, the nineteenth-century courts appreciated early on that the price of freedom is also regulation. Exemption clauses were not allowed to encompass any and every breach of contract. Liability for failure to deliver the goods of contract description could not be thus evaded. In this century, title was added to description as a compulsory, or mandatory, obligation.

Through the doctrine of fundamental breach, the courts today have consolidated the old position and indicated new refinements, additional obligations which the seller of goods and the hire-purchase finance company may not be able to shrug off by means of imposed exemption clauses. Precisely what these additional obligations are is still indefinite. The possible implications of *Karsales (Harrow) Ltd. v. Wallis* have been mooted in some detail in an earlier number of this journal.⁹⁶ Just a word may be added here.

The scope that the courts give to the doctrine of fundamental breach in the field of sale of goods and hire-purchase will depend on whether they are prepared to extend their classification of defects of description or identity as fundamental breaches to defects of quality or attribute. More concretely, will the courts be prepared to hold that breach of the fitness for a purpose and merchantable quality conditions amounts—at least, in certain circumstances—to a fundamental breach, as well as breach of the description and title conditions?

The penumbra of uncertainty surrounding “description,” “identity,” “quality,” “attribute” need not be laboured; and the opportunity for judicial discretion flowing from such uncertainty is enhanced by the fact that products of modern factories lack the ancient simplicity of peas and beans, or, indeed, mahogany and pine logs. Was not the Buick car delivered in *Karsales* the car described in the contract? Did not the difference between the car contracted for and the car delivered reside in defects as to “vital” qualities of the subject-matter? Therefore, is not a defect as to a vital quality as fundamental a breach as a defect of description “proper”? And, is it not a defect as to a vital quality where goods are, in any serious way, not reasonably fit for their purpose, as in *L'Estrange v. Graucob*, or are, in any serious way, not of merchantable quality?⁹⁷

It may be that the organic link between *Karsales* and the future of the doctrine of fundamental breach in sale of goods and hire-purchase will be found among the criteria of repudiation of a contract⁹⁸ or of total failure of consideration,⁹⁹ or the fundamental mistake cases, or a classification of conditions, all of which are fundamental but some of which may be more fundamental than

⁹⁶ Melville, “The Core of a Contract” (1956) 19 M.L.R. 26.

⁹⁷ Cf. Parker L.J. (as he then was) in *Karsales (Harrow) Ltd. v. Wallis*, *supra*, 943.

⁹⁸ Cf. *Alexander v. R.E.*, *supra*, 889–890.

⁹⁹ Cf. *Rowland v. Divall*, *supra*.

others.¹ In the ultimate analysis, however, it will be a matter of judicial discretion whether the sounder policy will be to draw the limits of the doctrine wide or narrow. If the unorganised consumer is to enjoy adequate legal protection, they should be drawn wide.

Fundamental Breach: Summing-up

The anatomy of the doctrine of fundamental breach at the time of writing may be outlined in the following propositions:

1. Where there is a fundamental breach of contract, then, provided the subordinate party does not waive the breach,² the contract breaker may not take advantage of any exemption clause purporting to displace his common law position, whether in respect of liability for negligence or wilful misconduct, or in respect of limitation of action or of damages or otherwise.

The better view is that such exemption clauses are nullified, not *ab initio*, but from the moment of the fundamental breach.³ Provided the subordinate party draws his pleadings properly, the burden is on the contract breaker of proving that the breach was not a fundamental one.⁴

2. Fundamental breach of contract includes two kinds of breach of contract:

(i) First, it generally refers to the nature of the obligation broken. That is to say, it refers to breach of an obligation regarded as fundamental *per se*, not merely "ancillary." Whether a contractual obligation is a fundamental one has to be determined in the light of each contractual transaction, following, by analogy with, or as an extension of, those cases previously analysed. Such obligations are, it is useful to note, of two types, namely,

(a) those fundamental obligations that are variable or displaceable by express contract; and,

(b) those fundamental obligations that are immutably fundamental, with the result that, where the contractual clause is in contradiction with any of them, either the clause is void for fundamental repugnancy, or, possibly, the agreement as a whole is deprived of contractual force.⁵

(ii) The second kind of breach of contract, which may be included in the doctrine of fundamental breach, refers to the

¹ Cf. *Smeaton Hanscomb v. Setty*, *supra*, 1470.

² *Alexander v. R.E.*, *supra*, 889-890. But see *The Cap Palos*, *supra*, 471.

³ *Alexander v. R.E.*, *supra*, 889; *Hain S.S. Co. v. Tate and Lyle* (1936) 52 T.L.R. 617; *N. Central Wagon and Finance Co. v. Graham*, *supra*, 11. See also, Chorley and Giles, *Shipping Law*, 4th ed., 172.

⁴ *Woolmer v. Delmer Price Ltd.*, *supra*; *Spurling v. Bradshaw*, *supra*, 466. *Alderslade v. Hendon Laundry*, *supra*, is reconciled on this point on the ground that the Court of Appeal did not there address its mind to the question of burden of proof; see *Spurling*, 466; *Woolmer*, 294.

⁵ See *Hong Guan and Co. Ltd. v. Jumabhoy & Sons Ltd.* [1960] 2 W.L.R. 754 at 762.

manner in which the obligation is broken, even though the obligation is not one fundamental *per se*. It may refer, in other words, to the breach of contract that is wilful or reckless.⁶

THE NEED FOR REFORM

The doctrine of fundamental breach is subject to the same limitation as the old principle in *Gibaud's* case. It only regulates exemption clauses in connection with breaches of contract. Even if the doctrine were developed as far as is reasonably possible, there would still be no general principle of control, only the incomplete fragments of a general principle; between the doctrine of fundamental breach and the other independent rules devised by the courts to control imposed contracts there would still remain a good deal of interdoctrinal space.

Even in the general field of application of the doctrine of fundamental breach, that is to say, where there is a breach of contract allegedly covered by an exemption clause, the doctrine, however fully exploited, may fall short of what is required. Thus, in accordance with the general principle of freedom of contract, dominant contracting parties may, and frequently do, contract out of the common law of damages. This is done by means of two kinds of standard clause, the liquidated damages clause, and what may be termed the limited damages clause. The latter subdivides into two species, the clause that excludes the second rule in *Hadley v. Baxendale*, and the clause that sets an uppermost limit, an absolute ceiling to the dominant party's liability for breach of contract. Examples of limited damages clauses are found in laundering contracts and in contracts for the carriage of goods and passengers by land, sea and air. To such clauses, activated as they are by a breach of the dominant party, the doctrine of fundamental breach will apply. But, the doctrine is only directed to the nature of the breach, not to the nature of the limit set to the damages that may be awarded. If the breach is not fundamental, the courts must enforce the contractual limit, however unreasonable it may be.

Again, there are imposed standard clauses that are activated by certain events defined in the contract but not involving any breach of contract at all. Plainly, such clauses stand entirely outside the sphere of control of the doctrine of fundamental breach, and few are touched by the other independent rules the courts have devised.

Take, for example, the operation of the liquidated damages clause. Where there is a breach of contract, regulation may be

⁶ *Quaere* whether, in theory, the subordinate party would be bound if an exemption clause covering wilful or reckless misconduct were brought to his notice and agreed by him at the time of contracting. Or should the courts require some concession to the subordinate party in return, on the lines of the old rule of the "fair alternative" in railway law?

effected through the doctrine of penalties. But, where there is no breach of contract, no countervailing rule obtains. This is the case of the liquidated damages clause in hire-purchase contracts (falling outside the 1938-54 Acts), in the form of a minimum payment clause, where the hire-purchaser exercises his right to return the goods without taking the precaution of first breaking the contract.⁷

Similarly, neither the doctrine of fundamental breach nor any of the other independent regulatory rules will apply to those operational clauses in the contract of guarantee that "strip a guarantor of virtually all those rights which the law would otherwise confer upon him—at any rate, where they conflict with the banker's interests,"⁸ nor, again, to warranty clauses⁹ or notice of claim clauses in insurance policies or other one-sided provisions in insurance policies that are purely operational or economic in nature. Doubtless, evidence would be forthcoming of other cases were an inquiry set in train.

The problem of the imposed, standard contract is one of the first magnitude of importance that ought to be referred to the Law Reform Committee. It is probable that a pluralist rather than a single approach would be the more desirable and effective. There are certain transactions, like insurance, that ought probably to be made the subject of specialised legislation, which might create a special tribunal to settle the terms of such transactions. Other transactions might simply be submitted to the exercise by the courts of a broad, general principle of control. In this case, the broader, or should I say, the more uncertain the principle, the better: the criterion of reasonableness is indicated.

2. TOLERATED LEVELS OF DISHONESTY AND INACCURACY

One of the basic questions of policy a legal system has to answer is, which kinds or degrees of dishonesty and inaccuracy are to be tolerated and which are to be legally suppressed or discouraged. In the field of contract, the question has to be answered with special reference to the behaviour of parties and the oral and written exchange between them in the zone of negotiations, that is to say, with reference, in particular, to the law of misrepresentation, independent oral warranties and undue influence.

On the whole, the law of contract as we know it today dates from no earlier than the end of the eighteenth century. Since then, the general trend has been towards steadily screwing up the standards of honesty and accuracy in the negotiation of contracts. The persistent wearing away of the distinction between statements of fact and statements of law, intention and opinion affords a good

⁷ *Associated Distributors Ltd. v. Hall* [1938] 2 K.B. 83.

⁸ Holden, *Securities for Bankers' Advances*, at 173-203. See also, Chorley, *Law of Banking*, 3rd ed., 248; Paget, *Law of Banking*, 5th ed., 417.

⁹ The subject, at present, of what is, from a common lawyer's point of view, an unsatisfactory private agreement in lieu of clear legal rights.

illustration of the overall trend.¹⁰ The fact that the common law of puff remains the cornerstone of the industry of advertising, which, in this aspect, may not unjustly be described as institutionalised dishonesty, simply demonstrates one of the natural limitations of the common law as an instrument of social control.

In recent years, attention has focused on two particular flaws in the law governing accuracy in the negotiation of contracts, namely, the absence of the remedy of damages for innocent misrepresentation¹¹ and the rule in *Seddon's case*.¹² Innocent misrepresentation has now become the subject of review by the Law Reform Committee. Just one or two additional remarks may, therefore, not be out of place. I say that innocent misrepresentation is concerned with inaccuracy, not dishonesty, in the negotiation of contracts. This, of course, inheres in its legal definition. But, one might add that it is not all cynicism to say that innocent misrepresentation might also be defined as misrepresentation where it has not been possible to discharge the heavy burden of proving fraud.

Be this as it may, however, about the rule in *Seddon's case*, as distinct from the parent rule in *Wilde v. Gibson*,¹³ little more can profitably be said here. There is no reason in principle why the rules about rescission for innocent misrepresentation should differ from those relating to fraudulent misrepresentation. *Long v. Lloyd*¹⁴ indicates that the courts themselves could now ease the rule in *Seddon's case* out of the law governing at least contracts for the sale of goods; but the problem of the rule in the total context of contract ought still to be reviewed.

As in the case of rescission, so in the case of damages, there ought not to be such a great difference between innocent and fraudulent misrepresentation. The denial of the action in tort for innocent, or rather negligent, misrepresentation rests on *Le Lievre v. Gould*¹⁵ and *Candler v. Crane*.¹⁶ In the latter, Asquith L.J. (as he then was) instanced as a contributory reason for the majority decision the dreadful plight of the cartographer whose carelessness ends the career of the *Queen Mary*. Lord Asquith said: "The case has been instanced by Professor Winfield and referred to by my brother Denning of a marine hydrographer who carelessly omits to indicate on his map the existence of a reef. The captain of the *Queen Mary*, in reliance on the map and having no opportunity of checking it by reference to any other map, steers her on the

¹⁰ The slowly growing volume of protective legislation is part of the same trend.

¹¹ See Salmond, *Torts*, 12th ed., 647 *et seq.* and the literature cited at 647, note 47.

¹² *Seddon v. N.E. Salt Co. Ltd.* [1905] 1 Ch. 326. See Cheshire and Fifoot, *op. cit.*, 235 *et seq.*; Anson, *op. cit.*, 227 *et seq.*; Sutton and Shannon, *op. cit.*, 199, 201, 202.

¹³ (1848) 1 H.L.Cas. 605.

¹⁴ [1958] 2 All E.R. 402; [1958] 1 W.L.R. 753.

¹⁵ [1893] 1 Q.B. 491.

¹⁶ [1951] 2 K.B. 164.

unsuspected rocks, and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners for negligence for some millions of pounds damages? If so, people will, in future, think twice before making maps. Cartography would become an ultra-hazardous occupation."¹⁷

This passage has been taken so seriously¹⁸ that it may be thought worth while to point out the singularly unrealistic character of the whole of Lord Asquith's cartography dictum.

Important ships of the mercantile marine, like the *Queen Mary*, do not use marine charts prepared by private individuals, as Lord Asquith's words suggest, but charts prepared by the Hydrographic Department of the Admiralty.¹⁹ The heyday of the private cartographer, of an Eratosthenes or a Strabo, a Ptolemy or a Pietro Viscontino, an Andrea Bianco or a Captain Greenville Collins, is over.²⁰ British Admiralty charts are prepared on the basis of the data received from the surveying ships of this and the other major maritime nations. In the actual production of the charts, the great pains taken in the selection and training of staff, the system of checking and double-checking of all points at all stages, and a long, perfectionist tradition virtually rule out the possibility of a hydrographic publication being inaccurate by reason of carelessness.²¹ British Admiralty charts have long enjoyed immense prestige throughout the maritime world, and mercantile marines other than the British rely on them.

Yet, suppose the impossible were to materialise, the unthinkable to occur, and a ship were lost through a negligent error in the production of an Admiralty chart. Clearly, no "unfortunate cartographer" will "be liable to her owners in negligence for some millions of pounds damages." The Crown would be vicariously liable, and, as such an accident would so closely touch national prestige and interest, it may be hazarded that the British Government would, given proof of the negligent error, shoulder responsibility for the loss without the prompting of litigation. Admiralty charts are, as it were, state guaranteed. Nor, may it be added, would the Hydrographic Department be led even by such an accident to "think twice before making maps." In considering

¹⁷ *Supra*, at 194. Winfield, it should be emphasised, employed the cartographer example in support of his contention that an action in tort *should* lie in certain circumstances for negligent misrepresentation. Winfield also referred to an official map: *Textbook of the Law of Tort*, 4th ed., at 387.

¹⁸ e.g., Paton (1951) 25 *Aus.L.J.* 293; Street (1951) 14 *M.L.R.* 346; Seavey, "Candler v. Crane, Negligent Misrepresentation by Accountants" (1951) 67 *L.Q.R.* 480; Goodhart (1951) 67 *L.Q.R.* 177; Salmond, *Torts*, Heuston's 12th ed., 649, note 56; 647, note 47.

¹⁹ An historical summary of the development of the Hydrographic Dept. of the Admiralty since 1795 is in *Charting the Seas in Peace and War* (H.M.S.O. 1947).

²⁰ See Bencker, "The Development of Maritime Hydrography and Methods of Navigation" (1944) 21 *International Hydrographic Review*, 117.

²¹ See "A Memorandum on the Organisation of the Hydrographic Department, Admiralty" (1950) 27 *International Hydrographic Review*, 12.

whether an action for damages should lie for negligent misrepresentation, at least in circumstances of the kind discussed by Lord Denning in his dissent in *Candler v. Crane*, the Law Reform Committee would lose nothing by ignoring Lord Asquith's dictum.

3. SOME ADDITIONAL POINTS

There is space just to mention four additional points. I say nothing of privity, consideration and the rule in *Gourley's case*,²² all of which will doubtless require reconsideration in the future.

1. The first matter is the preservation of the last shred of the Statute of Frauds, 1677, comprised in that part of section 4 dealing with the contract of guarantee. The Law Reform Committee justified this retention on the ground that the requirement of written evidence of the contract of guarantee necessarily safeguarded the guarantor.²³ In practice, however, the guarantor would enjoy greater legal protection if there were no written contract at all, since, in practice, the written contract is an imposed standard contract which, in the words already quoted, strips the guarantor of virtually all those rights the law would otherwise confer on him. The contract of guarantee would be one of the special contracts falling within the scope of the Law Reform Committee's general review of imposed, standard contracts. The repeal of the last bit of the Statute of Frauds might be treated as a subsidiary consequence of the general review. ✓

2. The second point refers to the common law of fundamental mistake, the sole major survivor of the will theory of contract. There are two questions that might be examined here. The first is the abandonment of the common law rules entirely in favour of the more flexible rules of equity: the way has already been indicated by Lord Denning in *Solle v. Butcher*.²⁴ The importance of the second question goes well beyond contractual mistake, extending through a wide segment of commercial contracts: it is the question of the "two innocent parties." It is time that the Law Reform Committee inquired whether a principle of distributive justice should be introduced into the "third party cases," as it has been into cases of frustration. There is no convincing reason why one of two innocent parties should, without more, bear an entire loss: they could share it; but, how and in what circumstances the Committee would have to investigate.²⁵

3. The third subject-matter that may be suggested for investigation is the way in which the doctrine of frustration has been

²² *B.T.C. v. Gourley* [1956] A.C. 185.

²³ Cmd. 8809.

²⁴ [1950] 1 K.B. 671. The consequences of substituting equity for common law following *Solle v. Butcher* are worked out in the present writer's "Study in the Relationship between Common Law and Equity in Contractual Mistake" (1952) 15 M.L.R. 297.

²⁵ See Devlin L.J. in *Ingram v. Little* [1960] 3 W.L.R. 504 at 531; [1960] 3 All E.R. 332, 351-352; also, the present writer's article in (1952) 15 M.L.R. 297 at 317-318.

applied to leaseholds. Here is a monument to blind logic that well deserves the Committee's inspection. It is not wholly an academic point. The mind, it is true, shrinks from imagining the future destruction of leasehold premises by enemy action, but comparable destruction may result from natural forces not only in this country, but, more particularly perhaps, in countries from which an appeal still lies to the Judicial Committee. Also, occupation by the state or other public authority of leasehold premises may yet recur.

4. Finally, mention must be made of infants' contracts. Does property pass to a fraudulent infant under a contract for the supply of non-necessaries? How far and in how many mutations of form may goods or money in the hands of a fraudulent infant be traced? ²⁶ May an adult vendor recover the non-necessaries supplied to an infant who later resiles from the bargain? May an infant enforce against the adult party a contract that does not bind the infant? These are some of the outstanding open points in the law of infants' contracts.²⁷ Litigation in this field has remained relatively dormant since the termination in 1914 of the golden era of the high living Oxbridge undergraduate. But, the large sums of money of which teenagers now dispose and to which a large section of trade and industry has been attracted may give these problems of infants' capacity a sharper significance than was foreseeable before the war. The open questions above mentioned and others may be solved by sufficient litigation alone; but, there remain two large questions that are foreclosed to the courts; is twenty-one too late an age today for contractual infancy, and—an old but still valid suggestion ²⁸—should not infants be bound by any contract that is on the whole for his or her benefit?

C. GRUNFELD.*

²⁶ See the discussion in Atiyah, "The Liability of Infants in Fraud and Restitution" (1959) 22 M.L.R. 273.

²⁷ See, generally, Treitel, "The Infants Relief Act, 1874" (1957) 73 L.Q.R. 194.

²⁸ Salmond and Williams, *Contracts* (2nd ed.), at 309-310.

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REFORM OF THE LAW OF RESTITUTION

THE author of a short paper on the reform of the law of restitution is faced with the initial difficulty that he is writing about a topic whose content is unstudied and whose boundaries are undefined. To embark in a paper of this kind on an examination of the limits or basis of the law of restitution would be out of place and would distract from its main purpose. I shall accordingly begin with this, perhaps arbitrary, definition of my task, namely, to consider the possibility of statutory reform of certain aspects of those non-tortious and, strictly speaking, non-contractual actions which are concerned with recovery in respect of benefits conferred upon the defendant, which the law requires the defendant to restore or repay or account for to the plaintiff, or in respect of which the law requires the defendant to reimburse the plaintiff.

It follows from this definition that I shall not here consider the advisability of a full codification of this part of the law. Such an omission is desirable for two reasons. First, because there is much to be said for the view that the topic is at present in too unsettled and undeveloped a condition to be ready for so radical a step; secondly, because any proposal for its codification in the near future is unlikely to be accepted by those responsible for law reform. For the time being, at least, the realistic reformer must content himself with limited, specific proposals designed to eliminate obvious injustices.

Even one who confines himself to such narrow limits as these is likely to run into difficulties when the object of his inquiry is so amorphous and unconsidered as the law of restitution. In such circumstances, there are two principal temptations for the reformer. He may be tempted to substitute a wide discretion for ascertainable legal rules, or to propose reforms without full consideration of their relationship to the remainder of the law. So far the Statute Book has acquired two major reforming statutes in the field of restitution—the Law Reform (Frustrated Contracts) Act, 1943, and the Law Reform (Married Women and Tortfeasors) Act, 1935 (in so far as it is concerned with contribution between joint and several tortfeasors). The former of these Acts, though admirable in many respects, provides an excellent illustration of the dangers of piecemeal reform. Its principal virtues are that it has, in a limited field, reduced the doctrine of entire contracts to its proper perspective and admitted a right to recover money paid to the extent that the consideration therefor has partially failed. But it has three main defects. First, it has vested in the courts a discretion so wide as to render it very difficult for a lawyer to give firm advice to his clients on the prospects of a claim under the Act. Secondly, the

provisions of the Act may lead to the payer of money under a contract thereafter frustrated being rendered liable to stand the risk of expenditure lost by the payee in circumstances in which the parties to the contract may never have intended that he should stand such risk.¹ Thirdly, it is illogical that the beneficial reforms already mentioned, relating to entire contracts and partial failure of consideration, should be limited to the case of frustrated contracts; why should they not be extended, for example, to contracts whose termination is occasioned by the breach of one of the parties?

The lesson of the Act is that reform by piecemeal legislation should be effected only in the case of a clearcut issue in respect of which comprehensive study has not only shown that reform is desirable but has also defined with reasonable clarity the principles to be enacted in the place of the rules of common law. The reformer must however also be satisfied that statute is the most appropriate method of reform. For it must not be forgotten that in the field of restitution some judicial development is still taking place. The early part of this century saw the high-water mark of the period of reaction; in more recent years we have seen more sympathy on the part of the judges towards the growth of the law, notably in the case of *quantum meruit* claims² and of the action for the recovery of money paid under a mistake of fact,³ and it is perhaps not unreasonable to hope that, with an increased understanding of the subject, this tendency may gather momentum.

In the light of these preliminary observations the reader will understand why I do not propose to consider in this paper such topics as equitable proprietary remedies, or the right to indemnity in respect of expenditure incurred in rendering services in an emergency without request. It can be argued with some force that the law on these topics appears at present to be unnecessarily limited; but they are still in an unsettled condition, and the proper place for their development appears, for the time being at least, to be the Law Reports rather than the Statute Book. It is my intention to limit myself to five rather narrow aspects of the law of restitution which have been the subject of criticism and which, in my view, may more reasonably be regarded as possible candidates for statutory reform. They are as follows:

(1) The rule that money paid under a mistake of law is in general irrecoverable.

(2) Problems of apportionment.

(a) The rule that money can only be recovered on grounds

¹ See Glanville L. Williams on *The Law Reform (Frustrated Contracts) Act, 1943*, at pp. 35-39.

² See, e.g., *Craven-Ellis v. Canons Ltd.* [1936] 2 K.B. 403; *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 W.L.R. 932.

³ See, e.g., *Morgan v. Ashcroft* [1938] 1 K.B. 49; *Larner v. London County Council* [1949] 2 K.B. 683.

of failure of consideration if such consideration has wholly failed.

(b) The rule concerning entire contracts.

(3) Benefits conferred under illegal contracts and the rule *ex turpi causa non oritur actio*.

(4) The defence of change of position.

(5) The recent "police cases."

1. MISTAKE OF LAW

It has long been accepted that a mistake of law does not, in general, provide grounds for recovery of money paid thereunder. The rule was laid down in 1802 in the case of *Bilbie v. Lumley*.⁴ In that case, an underwriter had paid up on a policy of insurance in the mistaken belief that a failure on the part of the assured to disclose material facts did not relieve him from liability to make the payment. In holding that the underwriter was not entitled to recover the money, Lord Ellenborough relied upon the proposition that "every man must be taken to be cognisant of the law." His application of this presumption in the field of restitution has, however, often been criticised. It is certainly not true that people actually know the law—as Lord Mansfield pointed out,⁵ "It would be very hard upon the profession, if the law was so certain, that everybody knew it"; and while a man cannot generally plead ignorance of law in excuse of a criminal offence, the rule of policy which forbids such a plea appears to have no relevance in actions of restitution.⁶ It is no doubt the realisation that there is some substance in this criticism that has led judges on occasion to justify on other grounds the rule that a mistake of law will not ground recovery. Thus, for example, it has been suggested⁷ that the plaintiff should not recover his money because the defendant may have changed his position on the faith of the payment. This suggestion does not however explain those cases where the defendant has not in fact changed his position; nor does it explain why, in English law, change of position is generally no defence to actions to recover money paid under a mistake of fact.

Nevertheless, the great majority of the decisions in which recovery of money paid under a mistake of law has been denied can be justified as applications of the principle of voluntary payment. In this context a voluntary payment does not, of course, mean a payment made by way of gift; it means a payment made with the intention of closing a transaction. If A demands money of B, B must decide whether he will comply with the demand or dispute the claim; if he gives way and pays, he cannot generally reopen the transaction and dispute the claim later at a time of his own

⁴ (1802) 2 East 469.

⁵ *Jones v. Randall* (1774) Cowp. 37, 40.

⁶ *Kiriri Cotton Co. v. Dewani* [1960] A.C. 192, 204, per Lord Denning.

⁷ See, e.g., *Brisbane v. Dacres* (1813) 5 Taunt. 143, 153, per Gibbs J.

choosing.⁸ This principle, that a voluntary payment cannot be recovered, is one of the main limits to recovery in the field of restitution. Its application is not confined to cases in which money has been paid under a mistake of law; it may also, for example, apply where money has been paid under a mistake of fact⁹ or under duress.¹⁰ Where it applies, it can be argued that in a sense the defendant has been unjustly enriched at the plaintiff's expense; but the so-called doctrine of unjust enrichment is one which, if it exists, is subject to certain limits and here it is overridden by the principle that the law does not favour the reopening of transactions that have once been closed.

But the principle of voluntary payment is not the same thing as the rule that a mistake of law will not ground recovery, and the transformation of the principle into the rule has led to many unfortunate consequences. It has touched off an unprofitable technical discussion about the difference between a mistake of law and a mistake of fact. The law of contract has become infected with the notion that a mistake of law provides no grounds for the avoidance of a contract, though the principle of voluntary payment has little or no place in that field. Moreover, the rule that a mistake of law will not ground recovery can, if strictly applied without reference to its underlying principle, work injustice in particular cases¹¹ and it is not surprising that we should find a conflict of judicial opinion in a case¹² where the plaintiff has paid money without realising that any legal issue has arisen, a case which may be described as being concerned with "bona fide ignorance" rather than "mistake" of law.

There is accordingly much to be said for the view that the strict rule that a mistake of law does not ground recovery should be abandoned and the principle of voluntary payment restated as the proper limit to restitution. It is however doubtful whether legislation is the proper weapon to effect such a change. It is true that the rule concerning mistake of law is widely regarded as axiomatic; but on the authorities it is probably still open to the House of Lords to explain the principle on which the rule is based so as to admit exceptions in cases where there has been no true voluntary payment. Whether the House would regard itself as free to take such a course is however a matter on which it is not easy to prophesy. Some indication that it may do so is, however, to be

⁸ *Rogers v. Ingham* (1876) 3 Ch.D. 351, 357, *per James L.J.*; *Brisbane v. Dacres* (1813) 5 Taunt. 143, 152, *per Gibbs J.*

⁹ *Moore v. Vestry of Fulham* [1895] 1 Q.B. 399; *Beevor v. Marler* (1898) 14 T.L.R. 289.

¹⁰ *Maskell v. Horner* [1915] 3 K.B. 106. Although the application of the principle in the field of duress was expressly recognised only by Rowlatt J., whose decision was reversed by the Court of Appeal, nevertheless it is a reasonable inference from the judgments in the Court of Appeal that the lords justices likewise recognised that the principle could so apply.

¹¹ See, e.g., *Harse v. Pearl Life Assurance Co.* [1904] 1 K.B. 558.

¹² *Stanley Brothers Ltd. v. Nuneaton Corporation* (1912) 107 L.T. 760; (1913) 108 L.T. 986.

found in the advice of the Board of the Privy Council in *Kiriri Cotton Co. v. Dewani*.¹³ There Lord Denning suggested cases in which a mistake of law might provide grounds for recovery of money paid thereunder, as, for example, where the defendant's conduct shows that, as between the plaintiff and himself, he was the one primarily responsible for the mistake, or where the defendant has misled the plaintiff when he ought to have known better. These examples appear to be consistent with the principle of voluntary payment; for in general the rule that a closed transaction will not be reopened has no application where the defendant has taken an unfair advantage or has acted unconscientiously.¹⁴

2. PROBLEMS OF APPORTIONMENT

The common law long ago set its face against apportionment, and its decision to do so severely limited the scope of a number of restitutionary remedies. Two important statutory reforms have, however, now enabled the courts to apportion in the case of benefits conferred under contracts thereafter frustrated and in respect of contribution between joint tortfeasors; but there remain other cases, not so important perhaps as these, in which the courts' refusal to apportion may still work injustice. Such injustice will generally flow from one of two rules—the rule that failure of consideration must be total, and the rule relating to entire contracts.

(a) *The rule that failure of consideration must be total*

This rule stems from the decision of the court of Queen's Bench, over 150 years ago, in *Hunt v. Silk*¹⁵; subject to certain refinements,¹⁶ it has been accepted ever since. The test whether the consideration has wholly failed appears to be, not whether the payee has expended money or done work in performance of his contractual obligations, but whether the payer has actually received a benefit in pursuance of the contract.¹⁷ The common law rule is that, if he has received any such benefit, however small, he cannot recover any part of the money he has paid on grounds of failure of consideration.

If the occasion of the determination of the contract is the payee's breach, the rule does not work hardship, because the payer can if necessary recoup himself by means of an action for damages for breach of contract. Again, if the contract has been determined by reason of some frustrating event, the Law Reform (Frustrated Contracts) Act, 1943, provides in effect that, in cases of partial

¹³ [1960] A.C. 192, 204.

¹⁴ *Ward v. Wallis* [1900] 1 Q.B. 675.

¹⁵ (1804) 5 East 449.

¹⁶ See, e.g., *Rowland v. Divall* [1923] 2 K.B. 500.

¹⁷ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.

failure of consideration, the payer shall be able to recover his money subject to his paying to the payee the value of any valuable benefit conferred upon him by the payee before the time of discharge. There are however other cases in which the rule may cause injustice. Thus the occasion for the determination of the contract may be the payer's breach, and in such a case the payer can recover his money only if the consideration therefor has wholly failed.¹⁸ It may, for example, be that a contract has provided that A is to pay by way of equal monthly instalments for work to be done by B. After he has paid two instalments A's insolvency forces him to repudiate the contract, and B accepts his repudiation. At that point of time, however, the work done by B may be of far smaller value than the amount of the two instalments paid by A. It is difficult to see why, in justice, A should not in such circumstances be entitled to recover the difference in value, subject of course to B's right to recover damages for A's breach of contract. Similar examples can be given in the case of money paid under contracts ineffective *ab initio*.

If the money has been paid by way of deposit, or the payer has otherwise contracted out of his right to restitution, different considerations will of course arise; generally he will not be entitled to recover money so paid, though equity may, in certain circumstances, intervene to relieve against forfeiture.¹⁹ Such cases apart, however, it is difficult to see why the payer should not in general be entitled to recover to the extent of the payee's enrichment; moreover it is inconsistent that the courts should have power to apportion the consideration where the contract has been frustrated, but not in other cases. The simple solution appears to be to grant a general right of recovery to the extent that the consideration for the payment has partially failed, subject always to the payee's right to recover damages in respect of any breach of which the payer has been guilty. Such a rule appears already to have been accepted in some of the United States.²⁰

(b) *The rule concerning entire contracts*

An entire contract²¹ is one which provides expressly or impliedly that a party must perform his part in full before he can recover any part of the price or other consideration to which he is entitled under the contract; in particular, in the absence of anything to the contrary, a contract is held impliedly so to provide where such consideration is a lump sum or is otherwise unapportioned. In such cases, it is well established that at common law the party who has contracted on such terms "can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that

¹⁸ *Dies v. British & International Mining and Finance Corporation* [1939] 1 K.B. 724.

¹⁹ *Stockloser v. Johnson* [1954] 1 Q.B. 476.

²⁰ *Williston on Contracts*, revised ed., §1476.

²¹ See, generally, Glanville L. Williams, 57 L.Q.R. 373, 490.

the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract."²²

In the event of premature determination of an entire contract, logic appears to demand that the entire nature of the contract should stand in the way of restitution in respect of benefits conferred thereunder only if it is clear that the contract expressly or impliedly provided that the party claiming restitution contracted out of his right to restitution in the events which have occurred. It is by no means unusual, nor is it necessarily unreasonable, that a contract should so provide²³; nor is it illogical that a contractual provision of this kind should exclude or otherwise affect restitutionary rights. Thus, for example, a ticket issued for a cricket match may effectively provide that no money will be refunded if the match is cancelled on account of bad weather. But the common law, instead of treating the question of exclusion of restitutionary rights as one of construction of the particular contract, has laid down the hard-and-fast rule that, whenever a party has entered into an entire contract in the sense already described, his right to recovery in respect of partial performance will be excluded, whether framed in contract or in restitution, save in the exceptional cases specified above by Blackburn J. The fallacy underlying the rule is the fruit of a confusion between contractual and restitutionary rights; for a contractual provision requiring a party to perform in full before he can recover the contract price is by no means necessarily intended to exclude the right to restitution in respect of partial performance in event of premature determination of the contract.

Statute law has however already made serious inroads into the field of entire contracts. The Apportionment Act, 1870, provides that periodic payments in the nature of income shall be considered as accruing from day to day; and sections 156 and 157 of the Merchant Shipping Act, 1894, have confirmed the previous statutory abolition of the old rule that freight is the mother of wages. In the case of frustrated contracts, the position is now governed by the Law Reform (Frustrated Contracts) Act, 1943. If today a party has partially performed his obligation under an entire contract which is thereafter frustrated, the court has power, by virtue of section 1 (3) of the Act, to award him remuneration to the extent that he has thereby conferred a valuable benefit on the other party. It is however provided by section 2 (3) that the court shall give effect to any contractual provision which is intended to have effect in the circumstances which have arisen. The result therefore is that, except in the special cases to which the Act does not apply, the doctrine of entire contracts has, so far as frustrated contracts are concerned, been reduced to its proper

²² *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 661, *per* Blackburn J.

²³ A famous example is *Cutter v. Powell* (1795) 6 T.R. 320, in which the court inferred from the high rate of a party's contractual remuneration that he had taken the risk of incomplete performance.

status as a genuine expression of the parties' contractual intention; only where the contract has expressly or by necessary implication so provided will the right to restitution be excluded or otherwise affected.

The Act of 1943 does not however assist a plaintiff whose breach is the occasion of the contract's premature determination; it has even been suggested ²⁴ that the Apportionment Act is likewise of no assistance to him. The well-known case of *Sumpter v. Hedges* ²⁵ demonstrates how the rule in entire contracts may cause injustice to such a plaintiff. There a builder had contracted to erect certain buildings on the defendant's land for a lump sum. Insolvency prevented him from completing the work he had contracted to do, but the rule in entire contracts prevented him from recovering any remuneration for the work he had done up to the time when he abandoned the work. In exceptional cases, of course, a plaintiff in such a position may be able to rely on the doctrine of substantial performance ²⁶; sometimes, too, the court will strain to hold the contract to be divisible, or to infer a fresh contract by the defendant to pay for the benefit he has received,²⁷ an inference which will readily be drawn in the case of a partial supply of goods under an entire contract of sale.²⁸ In other cases, however, the rule in entire contracts will still be applied. Here again, therefore, the Act of 1943 has resulted in inconsistency; and it is difficult to see why the rule in entire contracts should not in all cases be reduced to its proper status, whereby the plaintiff's restitutionary rights will only be excluded or otherwise affected if there is a clear contractual provision, express or implied, that they shall be so excluded or affected in the circumstances which have occurred.

3. BENEFITS CONFERRED UNDER ILLEGAL CONTRACTS

Where money has been paid in pursuance of an ineffective contract it may generally, if the expected return has failed to materialise, be recovered on the grounds that the consideration has wholly failed. These grounds are not however available in the case of a payment made under an illegal contract; for by virtue of the rule *ex turpi causa non oritur actio* the plaintiff cannot rely upon the simple failure of a return to materialise when such return was something forbidden by law.

In such circumstances the plaintiff must seek to rely, if he can, on some head of restitution other than simple failure of consideration. He may, for example, be able to recover his money if it has

²⁴ *Moriarty v. Regent's Garage Co.* [1920] 1 K.B. 423, 433-435, *per* Lush J.

²⁵ [1898] 1 Q.B. 673. See also *Sinclair v. Bowles* (1829) 9 B. & C. 92; *Munro v. Butt* (1858) 8 E. & B. 738.

²⁶ *H. Dakin & Co. v. Lee* [1916] 1 K.B. 566; *Hoening v. Isaacs* [1952] 1 T.L.R. 1360.

²⁷ *Lysaght v. Pearson*, *The Times*, March 3, 1879.

²⁸ *Oxendale v. Wetherall* (1829) 9 B. & C. 386; Sale of Goods Act, 1893, s. 30 (1).

been paid under a mistake of fact, or fraud, or even a mistake of law,²⁹ provided that the mistake or fraud has concealed the illegality from him. He may be able to obtain relief, at law or in equity, if the payment has been exacted from him by means of some form of compulsion or undue advantage. He may have paid the money on one of those occasions on which the law will grant restitution for reasons of policy—as where a statute has expressly or impliedly given a right of recovery; or where the contract is still executory and the plaintiff has repented from the illegal transaction; or where equity will give relief despite the fact that the parties' hands are not clean, "the relief not being given for their sake, but for the sake of the public."³⁰ These cases are often described as cases in which the parties are not *in pari delicto*. Their practical importance is not however very great, and in recent years the tendency has been if anything to restrict their scope.³¹

Generally, therefore, despite failure of consideration, money paid under an illegal contract is irrecoverable at law. The courts refuse to assist in such sordid matters: "no polluted hand shall touch the pure fountains of justice."³² Seen through the eyes of the eighteenth century, when illegal acts were more obviously reprehensible than many are today, this was not an altogether unreasonable policy. Even today, when the wrongdoing is serious, we need not regret the plaintiff's loss, though we may look askance at the defendant's doubly unjust enrichment. But when the illegality is of a more technical nature, especially if (as may well be the case) the plaintiff is ignorant of the rule of law rendering the contract illegal, serious injustice may result. Take this simple example:

A, an Englishman resident in the United Kingdom, travels abroad to France. He is introduced to B, a Frenchman, whom he informs, truthfully, that he is in urgent need of ready cash to complete a business deal. B trusts A, and advances him a substantial sum in francs. A returns to England and never repays the money. B instructs English solicitors to commence proceedings for its recovery; they are however forced to advise him that, since the transaction was in contravention of section 1 (1) of the Exchange Control Act, 1947, it was illegal by English law and no action will lie in England for the recovery of the money.³³

The advice would no doubt be accompanied by an expression of regret that English law should be so ineffective as to be unable to give redress in a case of such near-fraudulent conduct.

It is not surprising therefore that voices have been raised in

²⁹ *Kiriri Cotton Co. v. Dewani* [1960] A.C. 192, 204, *per* Lord Denning.

³⁰ *Vauxhall Bridge Co. v. Earl Spencer* (1821) Jac. 64, 67, *per* Lord Eldon.

³¹ See *e.g.*, *Harse v. Pearl Life Assurance Co.* [1904] 1 K.B. 558; *Bigos v. Bousted* [1951] 1 All E.R. 92; *Green v. Portsmouth Stadium Ltd.* [1953] 2 Q.B. 190; *cf.* *Kiriri Cotton Co. v. Dewani* [1960] A.C. 192.

³² *Collins v. Blanton* (1767) 2 Wils.K.B. 341, 350, *per* Wilmut C.J.

³³ *Boissevain v. Weil* [1950] A.C. 327.

condemnation of the judicial policy of non-interference. The rule is said to be based on public policy, but two distinct reasons have been given for it. First, it is apparently thought that the risk of non-recovery will deter the potential delinquent from indulging in illegality. This is however very doubtfully true. Indeed, it has often been said ³⁴ that a contrary rule would be more likely to achieve such a result. As Aston J. said ³⁵ in 1773 of a case which is perhaps less common (or at least less blatant) today—"I question whether bribery in elections, the growing vice of this kingdom, would not be more likely to be reduced if it were known to be otherwise, and that a briber could recover against the bribee." The second and principal reason for the rule is the fear that justice would be tainted and the dignity of the court offended by intervention on the plaintiff's behalf. It is to be questioned, however, how far this fastidious aloofness is in fact sound policy. It certainly cannot be described as a very constructive approach; and it can lead to very arbitrary results, as is particularly apparent in those cases ³⁶ in which land or goods have been transferred under the illegal contract, when the plaintiff's right to restitution in respect of such land or goods will depend on the, in a sense, arbitrary question whether or not title has vested in the transferee. Moreover the rule can, as I have already indicated, lead to serious injustice. Other solutions of the problem have been suggested.✓ The proposal that the court should decide the question on the merits of the whole case, taking into account the nature of the illegality and the relative wickedness of the two parties, that it should be "free to choose such course as would, in practice, best serve the public interest," ³⁷ may well be regarded as too vague and undefined to merit serious support; there is more, perhaps, to be said for the view that the plaintiff should be entitled to recover his payment subject to forfeiture in part to the State by way of penalty, though even here there are difficulties, not only in defining the amount of the penalty in the many cases which may arise, but also in permitting recovery at all when the illegality is of a serious nature.

It may be that proposals for reform are unlikely to be considered in a case where the sufferer from the shortcomings of the law is necessarily a wrongdoer, but it should be borne in mind that today much wrongdoing is not necessarily morally reprehensible.³⁸ If reform were to be seriously considered, it might well be advisable to study the rules applicable in this respect in the courts of other

³⁴ *Smith v. Bromley* (1760) 2 Dougl. 696n., 698, per Lord Mansfield; *Pickard v. Bonner* (1794) Peake 289, 290, per Lord Kenyon; *Stokes v. Twitchen* (1818) 8 Taunt. 492, 494, per Vaughan *arguendo*.

³⁵ *Walker v. Chapman* (1773) Lofft 342, 347.

³⁶ See e.g., *Jajbhay v. Cassim* [1939] A.D. 537 (South Africa); *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65; *Singh v. Ali* [1960] A.C. 167; cf. *Taylor v. Chester* (1869) L.R. 4 Q.B. 309.

³⁷ *Grodecki*, 71 L.Q.R. 254, 273.

³⁸ *Beresford v. Royal Insurance Co.* [1937] 2 K.B. 197, 220, per *curiam*.

European countries, and the experience of such courts in the application of these rules.

4. THE DEFENCE OF CHANGE OF POSITION

In many of the reports we find dicta to the effect that the action for money had and received "will only lie when it is inequitable in the defendant to retain the money which the plaintiff claims."³⁹ On this basis, it would not have been surprising to find that a defendant was not required to repay the money he had received if he had bona fide changed his position on the faith of the payment. He might, for example, have indulged in some extraordinary expenditure; he might, by lapse of time, have lost some remedy against a third party; he might have employed the money in some unprofitable investment which he would not otherwise have embarked upon. If a man has so acted in good faith, there is much to be said for the view that his liability to refund should be limited by the extent that his position has changed, provided that he did not acquire the money by wrongdoing, or even induce its transfer by an innocent misrepresentation. To compel him in such circumstances to refund in full is to make him the sufferer for the plaintiff's error or misfortune; and there is much to be said for the view that the plaintiff should bear a loss which has resulted from his own mistake.⁴⁰

The American *Restatement of Restitution* affords full recognition to the defence in restitutionary actions. The rule is stated as follows:⁴¹

(1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

(2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.

(3) Change of circumstances is not a defense if

(a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortious, or

(b) the change occurred after the recipient had knowledge of the facts entitling the other to restitution, and had an opportunity to make restitution.

In England, however, the position is by no means clear. In some places we find recognition of doctrines akin to the defence of change of position. Thus it is well settled that a transaction will

³⁹ *Freeman v. Jeffries* (1869) L.R. 4 Ex. 189, 197, per Kelly C.B.

⁴⁰ See *Ingram v. Little* [1960] 3 W.L.R. 504, 531, per Devlin L.J.

⁴¹ §142; see also §69.

not be rescinded unless there can be *restitutio in integrum*. In the words of Lord Blackburn ⁴²:

“ It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*. . . . It is a doctrine which has often been acted upon both at law and in equity.”

Some similar principle appears to lie at the root of the rule that the action for money had and received will only lie to recover money on grounds of failure of consideration if the consideration for the payment has wholly failed; generally, partial failure of consideration is not enough, for recovery will not be allowed when the parties cannot be put *in statu quo*.⁴³ Sometimes, too, the fact that the defendant may have changed his position on the faith of the payment is invoked in support of other limits to the right to restitution.⁴⁴

✓ Such cases apart, however, a general defence of change of position does not appear to have been accepted by English law. The nearest approach is perhaps to be found in the field of agency. If an agent has innocently received money from a third party and has paid it over to, or settled it in account with, his principal in good faith before he has notice of the plaintiff's claim thereto, it is settled that the plaintiff has no rights against the agent for the recovery of the money but must, if he can, proceed directly against the principal.⁴⁵ In such cases, however, the fact that the plaintiff can proceed against the principal means that, in theory at least, he is not altogether deprived of his means of recovery by the agent's defence.

In other cases the defendant, although he may not be able to rely on a defence of change of position as such, is afforded protection by the doctrine of estoppel. This appears perhaps most clearly from a difficult line of cases ⁴⁶ in which the plaintiff has paid the innocent holder of a forged bill of exchange, but is denied recovery of his money from the holder if he has so conducted himself as to lead the holder to believe that he considered the signature on the bill to be genuine, it being presumed that the holder's position has altered if notice of the forgery is not given until the day after payment.⁴⁷ There are however other cases in which it has been held that the plaintiff is estopped from asserting

⁴² *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App.Cas. 1218, 1278.

⁴³ *Hunt v. Silk* (1804) 5 East 449.

⁴⁴ See e.g., *Brisbane v. Dacres* (1813) 5 Taunt. 143, 153, per Gibbs J.; *Reid v. Rigby & Co.* [1894] 2 Q.B. 40, 45, per Collins J.

⁴⁵ *Buller v. Harrison* (1777) 2 Cowp. 565; *Holland v. Russell* (1861) 1 B. & S. 424; (1863) 4 B. & S. 14; cf. *Newall v. Tomlinson* (1871) L.R. 6 C.P. 405.

⁴⁶ See, e.g., *Price v. Neal* (1762) 3 Burr. 1354; *Cocks v. Masterman* (1829) 9 B. & C. 902; *London & River Plate Bank v. Bank of Liverpool* [1896] 1 Q.B. 7.

⁴⁷ *Cocks v. Masterman* (1829) 9 B. & C. 902, 908-909.

his claim to the money,⁴⁸ and it seems that in equity, too, the plaintiff may by his conduct similarly raise an equity against himself whereby he is denied recovery.⁴⁹ In recent years there has been a tendency to state that the plaintiff must be guilty of some breach of duty before such an estoppel will be raised against him.⁵⁰ Authoritative though the sources of these remarks may be, it is doubtful whether the decided cases indicate any such requirement to be necessary. The case which has chiefly inhibited the development of the estoppel doctrine in this field is *R. E. Jones Ltd. v. Waring & Gillow Ltd.*,⁵¹ a decision of the House of Lords; the decision was however by a bare majority, the result may be thought unjust, and the *ratio decidendi* of the case is extremely difficult to ascertain. The present scope of the estoppel doctrine must be regarded as uncertain. However, whatever the scope of the estoppel doctrine now may be, the mere fact of change of position appears to have been widely rejected as a general defence to personal actions in restitution, both at law⁵² and in equity,⁵³ though it may provide some limit to those proprietary remedies whereby money may be traced in equity.⁵⁴

✓ This apparent rejection of the defence of change of position has been criticised,⁵⁵ but it is matter on the merits of which it is not easy to decide. In a sense, it is a question of adjustment between two innocent parties. The estoppel doctrine, liberally interpreted, can do much to mitigate any hardship that a defendant may have suffered in this way. The essential difference between the estoppel doctrine and a simple defence of change of position is that the former requires some representation by the plaintiff to the effect that the defendant is entitled to treat the money as his own. Often there will have been some such representation; but it will not always be so, particularly in cases where the plaintiff is someone other than the person who actually paid the money to the defendant, as for example where next-of-kin proceed directly in equity against a person for the recovery of money wrongly paid to him by an executor. It can be argued in favour of the present English view that, although the defendant may have received the money in good faith, it is only when he has given value therefor or when the plaintiff has by his conduct induced him to change his position that

⁴⁸ Notable examples are *Skyring and Greenwood v. Cox* (1825) 4 B. & C. 281 (see especially Bayley J. at pp. 290-291); *Deutsche Bank (London Agency) v. Beriro & Co.* (1895) 1 Com.Cas. 123, 255; *Holt v. Markham* [1923] 1 K.B. 504.

⁴⁹ *Ministry of Health v. Simpson* [1951] A.C. 251, 276, per Lord Simonds.

⁵⁰ *R. E. Jones Ltd. v. Waring & Gillow Ltd.* [1926] A.C. 670, 692-693, per Lord Sumner; *Weld-Blundell v. Synott* [1940] 2 K.B. 107, 114-115, per Asquith J.

⁵¹ [1926] A.C. 670.

⁵² *Baylis v. Bishop of London* [1913] 1 Ch. 127; but see *Larner v. London County Council* [1949] 2 K.B. 683, 688-689, per curiam.

⁵³ *Ministry of Health v. Simpson* [1951] A.C. 251.

⁵⁴ *Re Diplock* [1948] Ch. 465, 546-550.

⁵⁵ Jones, 73 L.Q.R. 48.

it becomes inequitable to disturb his title to the money: where however the defendant is a volunteer and there has been no such conduct on the part of the plaintiff, the equities are not regarded as equal—the scales are weighted in the plaintiff's favour, the defendant having had the beneficial use of money which in justice belongs to the plaintiff. After all, it will certainly cause hardship to the plaintiff to deprive him of the money.

Yet the results of such a doctrine can be very harsh. Many people were unhappy about the results of the decision in *Re Diplock*,⁵⁶ in which a large number of charities were forced to disgorge money which had mistakenly been paid to them by executors under a will, it being held that they could not plead change of position by way of defence to the personal action in equity by which the next-of-kin proceeded against them. If a defence of change of position were to be generally adopted, it would of course have to be rendered subject to certain safeguards, on the lines of those provided in the American *Restatement*; and the meaning of "change of position" would require to be elucidated. For example, few people would, I think, suggest that the mere expenditure of money should in this context be regarded as a change of position. However, courts which are accustomed to deal with the doctrine of estoppel should have little difficulty in developing such a concept, and experience could be gathered from the American cases already decided on this topic.

5. THE RECENT "POLICE CASES"

An important head of restitutionary recovery, falling within the field of compulsion rather than mistake, is the right to recover money expended in compulsory discharge of another's liability. To bring himself within the doctrine, it is not enough for the plaintiff to show that his compulsory payment has conferred some incidental benefit upon the defendant. In English law, the benefit must consist in the discharge of a legal liability of the defendant. If such be the case, there is no doubt that the defendant has been benefited by the payment; for he had no choice about the matter—being under a legal liability he would, apart from the plaintiff's payment, have had himself to discharge it.

This important requirement, that the plaintiff's payment must have operated to discharge a liability of the defendant, was the crucial factor in three recent cases, the facts of which were all substantially the same. In each case the defendant had negligently injured a policeman while on duty, as a result of which the policeman had been disabled from performing his duties for a certain period of time. The authority which was responsible for the policeman's salary was required by the statutes relating to the police and regulations made thereunder to continue to pay a

⁵⁶ [1948] Ch. 465; [1951] A.C. 251 (*sub nom. Ministry of Health v. Simpson*).

policeman so injured, despite the fact that he was thereby prevented from performing his duties; and, having so paid the policeman, the authority sought to recover from the defendant the amount that it had been so compelled to pay. The authority could not frame its claim as an action *per quod servitium amisit* ⁵⁷; it therefore fell back on the action for money paid, and invoked the restitutionary doctrine described above.

In the first case, *Receiver for the Metropolitan Police District v. Tatum*,⁵⁸ Atkinson J. held that the authority was entitled to recover; he took the view that "the real legal liability for the payment of this money rests on the defendant, because his negligence was the cause of the receiver being compelled to pay."⁵⁹ This view was substantially accepted and followed by Slade J., who came to the same conclusion in the second case, *Receiver for the Metropolitan Police District v. Croydon Corporation*.⁶⁰ But in the third case, *Monmouthshire County Council v. Smith*,⁶¹ Lynskey J. refused to follow the two previous decisions. He pointed out that the police authority was still bound to pay the policeman's salary despite his incapacity, the policeman had not therefore lost any part of his salary and was accordingly unable to recover damages from the defendant in respect of loss of earnings.⁶² It followed that the defendant was never liable to the policeman in that respect, and that the payment of the policeman by the police authority did not discharge any liability of the defendant. The authority's action therefore failed; it was nothing more than a claim for loss of services clothed in the inappropriate guise of an action for money paid.

On appeal,⁶³ the decision of Slade J. was reversed and that of Lynskey J. was upheld. The truth of the matter was that the police authority had lost not the payment to the policeman, but the policeman's services; the defendant had not been enriched by the payment to the policeman, but had reaped an incidental relief in that his liability to the policeman for damages had been reduced by reason of the statutory rule requiring the police authority to continue paying the policeman during the period of his incapacity.

There is however much to be said for the view that wrongdoers should be deprived of the incidental benefit which they so receive from the statutory rule. Under the law as it now stands, police authorities are subsidising the insurers of negligent motorists. As Morris L.J. said ⁶⁴—

⁵⁷ *Attorney-General for New South Wales v. Perpetual Trustee Co.* [1955] A.C. 457; *Inland Revenue Commissioners v. Hambrook* [1916] 2 Q.B. 641.

⁵⁸ [1948] 2 K.B. 68.

⁵⁹ [1948] 2 K.B. 68, 73.

⁶⁰ [1956] 1 W.L.R. 1113.

⁶¹ [1956] 1 W.L.R. 1132.

⁶² [1956] 1 W.L.R. 1132, 1149-1150.

⁶³ [1957] 2 Q.B. 154.

⁶⁴ [1957] 2 Q.B. 154, 166.

“It can be said with some force that the wrongdoer has been fortunate in that he has injured someone who must be paid whether he is injured or not, whereas those entitled to his services are during the period of incapacity denied those services. It might be said that a case could be put forward for consideration as to whether there might be some change in the law in regard to this matter so as to permit the recovery of wages payable and paid in reference to a period of incapacity caused by a wrongdoer.”

It is however submitted that the present unsatisfactory state of affairs arises not from any defect in the common law, but in the enactment of the statutory rule without its necessary corollary, namely either (a) that the right of the policeman to receive his salary from the police authority during the period of his incapacity, and the receipt by him of such salary, should not prevent him from recovering the amount of his salary, which he would otherwise have lost, by way of damages from the person who has wrongfully caused such incapacity, for which damages if recovered he should be accountable to the police authority; or (b) that a police authority which is compelled by the statutory rule to pay a policeman during a period of incapacity caused by the wrongful act of any person should have a direct action against such person to recover from him the amount so paid.⁶⁵

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⁶⁵ I am indebted to Mr. Aubrey Diamond of the London School of Economics for a number of valuable suggestions.

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SOME REFORMS IN THE LAW OF TORT

PERFECTION, said Arnold Bennett, is a form of death. If this is so, the law of tort is a lusty infant; and it is proposed to indicate here some of the principal ways in which it might be helped to decay into a more satisfactory state.

The outstanding anomaly in the law, as it now stands after the labours of the Law Reform Committee, is the prohibition of suits between husband and wife. This matter has already been referred to the Committee, and it urgently needs attention. The rule operates no longer to preserve domestic amity, but only for the benefit of insurance companies, or to the detriment of third-party defendants, or, in face of all reason, where a marriage has broken down.

Here, briefly, are the arguments. Actions in tort are supposed to be inconsistent with the affection that ought to prevail between husband and wife. But observe the limitations upon the rule. If a husband "beats up" his wife, she cannot sue him, because to sue him would be unwifely. She can, however, prosecute him in the criminal courts, and have him fined or imprisoned; there is nothing unwifely in these proceedings. Actions in contract are allowed between spouses, even though the breach of contract is also a tort, and even though the action is fought with bitterness; but an action in tort for negligence is disallowed, though conducted by the parties in perfect amity, for the indirect purpose of making an insurance company contribute to the family exchequer.

Suppose, for example, that a husband, taking his family for a ride in the car, negligently collides with a tree. The husband has unrestricted third-party cover. He is liable to his injured children, who can therefore, in effect, obtain damages from his insurance company. But he is not liable to his injured wife, and she is left without remedy.

The exception allowing an action for proprietary torts applies only in favour of the wife. It is true that a husband can apply under section 17 of the Married Women's Property Act, 1882, for an order as to the ownership or possession of property, but this does not give him a right to damages if his wife wilfully damages or destroys his property.

In respect of premarital torts, where the parties marry before making the insurance company pay, the judges have now found a way round for the wife's benefit, treating her premarital right of action as her property which survives the marriage.¹ Unfortunately, owing to the wording of the legislation, this reasoning

¹ *Curtis v. Wilcox* [1948] 2 K.B. 474 (C.A.).

cannot be used in the husband's favour. Consequently, a man who marries before obtaining a judgment in tort against his insured bride will still be left to repent at leisure.

Among the uncertainties in the law on this matter is that relating to divorce. It was held in *Phillips v. Barnett* (1876)² that divorce could not render actionable a tort committed during marriage; but it is just possible that this decision might now be reconsidered.³ Before 1935, judicial separation enabled the spouses to sue each other for torts committed after the separation; but by a legislative oversight the position has been changed, and there is now no exception in this case.⁴ Thus a rule intended to promote marital harmony continues to be applied after the marriage is officially acknowledged to have broken down.

Perhaps the worst consequence of the present law is in respect of concurrent tortfeasors. If an accident happens to the wife as passenger through the concurrent negligence of her husband as driver and a third party, the wife can sue the third party, however small his proportion of the total fault; but he is deprived of any right of contribution against the husband. Thus the rule enables husband and wife jointly to enrich themselves at the expense of a stranger.

The position is odd where a husband is driving in the course of his employment, with his wife as a lawful passenger. She, if injured by the husband's negligence, can sue the master; and the master can apparently obtain an indemnity against the husband for breach of his contract of service. This is as it should be, but it does mean that the husband's protection breaks down in practice in this particular situation.⁵ If the rule barring tort actions between spouses were a good rule, Parliament ought to enact that the wife cannot sue the master, for the result of such an action is to achieve an indirect violation of the rule. But no one would suggest that this is the proper solution of the problem.

There is a humble but necessary job to be done in clearing away the remnants of the action for loss of services, resulting from a tort to the servant. Now that it has been decided that this action lies only in respect of menial servants, the position is ridiculous. A company which has spent two or three thousand pounds in training a university graduate for management can recover nothing when he is injured; but for the loss of a housewife's daily help an action lies. On the whole, it seems to be the right policy to circumscribe the possible plaintiffs to an action in tort, and therefore to deny recovery to the employer, however great his

² 1 Q.B.D. 436.

³ Williams, *Joint Torts and Contributory Negligence*, p. 102, note 15.

⁴ This is because of the repeal by the Law Reform (Married Women and Tortfeasors) Act, 1935, Sched., of s. 194 of the Supreme Court of Judicature Act, 1925.

⁵ But it may pay the husband to become bankrupt and then live on his wife's damages.

loss. But, plainly, this policy should deny recovery also to the master of a cook or nursemaid.

The abolition of the action for loss of services might well be accompanied by a treatment of the problem of wages during illness. The Court of Appeal has settled that a master who pays wages during the illness of a servant brought about by the negligence of the defendant cannot recover from the defendant on the principles of quasi-contract, even though the master was under a duty to make the payment to the servant.⁶ It is strange that no argument was advanced before the court that the master making such payment was subrogated to the servant's rights in respect of this item of damage. At any rate, justice clearly requires that the offender should be made to pay somehow. It is submitted that the principle of subrogation could well be applied by statute to the situation. Incidentally, the principle of subrogation could be extended to remedy the injustice in cases like *Cattle v. Stockton Waterworks Co.*⁷ Although the court in that case left open the question whether the doctrine of subrogation could be used, no member of the Bar has yet thought of arguing the matter; the argument might succeed even now, but it would be better to put it on a statutory footing.

✓ Closely related to this is the problem produced by *Best v. Samuel Fox & Co. Ltd.*,⁸ holding that the husband's action for loss of his wife's consortium and services is not available in reverse in favour of the wife. The reason given was that the action, being an anomalous survival, ought not to be extended. But matters cannot be left like this: either the action should be abolished, or it should be made available to both spouses on equal terms. What is to be done?

The issue of policy is not simple, because it may plausibly be maintained that for the purpose of recovery in tort the family should be treated as a unit. In other words, notwithstanding the general policy against allowing recovery to A where he has been indirectly affected by a tort to B, members of the family of the victim should perhaps be allowed to add their claims. Although it certainly sounds old-fashioned to speak of a husband having a right to his wife's consortium and services, the fact is that the action sometimes works in a desirable way. For example, it allows the husband, when his wife has been injured, to add a claim for his special damage by way of travelling expenses to visit his wife in hospital, on the theory that this promotes the wife's recovery. It would be hard upon a low-income family if such a claim had to be disallowed. And why should not the wife get her travelling expenses if she is visiting her husband?

⁶ *Receiver for the Metropolitan Police District v. Croydon Corpn.* [1957] 2 Q.B. 154 (C.A.).

⁷ (1875) L.R. 10 Q.B. 453.

⁸ [1952] A.C. 716.

It is true that an item of this kind may be comparatively small in relation to the general damages in the action. But sometimes the husband's special damage may be quite large, as if he has paid for a costly operation. If the husband's action were abolished, the cost of the operation could only be recovered by allowing it in the claim by the wife.^{8a} But this means that if the parties subsequently quarrel, the husband might find it difficult to obtain recoupment from the wife; and if the wife dies, the husband might have to bear death duties on the damages which are morally his.

This question cannot be considered in isolation from the Fatal Accidents Acts. It is universally assumed that the policy of these Acts is sound, and that when a person is tortiously killed the other members of his family should have a right of action for their loss. Why are they not given the same right of action on an injury short of death? The only possible answer is that, when the injury does not amount to death, the immediate victim of the tort may be awarded damages for loss of earnings. Endowed with these damages, he may use them to benefit his wife and children in the same way as he would have used his earnings if he had been able to continue in employment. On death, the right to damages for loss of earnings ceases, and the dependants are then logically furnished with a right of action on their own account. On the whole this scheme works pretty well, even though there may be individual anomalies. However, the argument that the injured plaintiff lying in hospital can support his family out of his damages for loss of earnings ceases to apply when the members of the family are put to *extra* expense on account of the injury. This is not likely for children, but it is likely as between husband and wife. There are medical and visiting expenses, and there is the cost of domestic help to replace an injured wife. These damages cannot properly be allowed to the immediate victim of the tort, when they are in fact damages incurred by the victim's spouse.

The solution suggested is this: that when a married person is tortiously injured, the spouse should be allowed recovery of medical and nursing expenses, and all other costs properly incurred in connection with the illness, as well as the cost of providing domestic help to replace the injured partner. In practice this action would benefit the husband on an injury to the wife rather than the wife on an injury to the husband, but theoretically it would be open to both, and thus would be free from the reproach of the present law that it provides a one-sided remedy. The remedy proposed should be in substitution for the husband's present action for loss of consortium and services. In effect it would mean abolishing the

^{8a} Unless the view of Diplock J. in *Kirkham v. Boughey* [1958] 2 Q.B. at 342 is accepted, that the husband can claim quasi-contractually on the basis of his duty to provide maintenance for his wife. See Mr. Prichard's comment in [1960] C.L.J. 156.

right to general damages for loss of consortium, while retaining the substance of the action with limited damages and extending it to both marital partners.

If this solution is rejected, the only rational alternative is to give the wife as well as the husband an action for damage caused in respect of the matrimonial relationship by the negligence of the defendant. An example is where the defendant has negligently injured the husband and caused him to become impotent. This particular case is perhaps the strongest that can be put in favour of recovery by the wife, and Mr. G. H. L. Fridman has ably put the case for a change in the law along these lines.⁹ At the same time, my own feeling, which is hardly capable of argumentative demonstration, is that the general policy of the law limiting the possible plaintiffs in tort actions is sound. Mr. Fridman argues that the matrimonial relation has social value and should be protected by law; and he thinks that allowing a tort action for interference with the consortium would tend to give it that protection. I am not sure whether the materialistic functioning of the law of tort can do much to nourish a sentimental relation; but let it be supposed for the sake of argument that the injured spouse does attach value to a money payment as compensation for thwarted affections. There are two possibilities: either you do as the law now does, giving large damages to the husband for his bodily injury, thus putting him, perhaps, into a position of comparative affluence so that he can provide his wife with material comforts and satisfactions in place of the sexual satisfaction that she has lost, or you reduce the damages paid to the husband and give a substantial portion direct to the wife by way of compensation to her. If it were possible to conduct a social experiment to discover which of these two courses better promoted the continuation of the marital relationship in the difficult situation resulting from the sexual impotence of the husband, I should guess that it would be the first. ? ! ?

✓ While on the subject of the marital relationship, it would be desirable to clarify the wife's measure of damages for loss of her own capacity for work. At present, when the wife is injured, the position is that the husband gets damages for loss of his wife's services, and the wife who is not in outside employment does not get damages for diminished ability to work.¹⁰ It would accord more with our present outlook to give the damages to the wife, whether she is in outside employment or engaged only on housewifely duties. One reason for this change is that the husband and wife may quarrel shortly after the action is concluded, and if they do it is obviously better that the wife should enjoy the damages for her own impaired capacity for work than her husband.

The opportunity should be taken to arrive at some consistent

⁹ "Consortium as an 'Interest' in the Law of Torts" (1954) 32 Can.B.R. 1065.
¹⁰ 18 M.L.R. 517.

solution of the problem of contributory negligence in relation to these derivative actions. ✓ At present, the position is that the contributory negligence of the wife does not affect the husband when he sues for loss of her services,¹¹ but does affect him if he sues, on her death, under the Fatal Accidents Acts.¹² These rules are fundamentally opposed, and one of them should be selected to be applied to both situations. The question is whether the husband should be regarded as suing in his own right, or derivatively through his wife.

It is impossible to find a solution by the analogy of other legal rules, because these rules are discordant. (1) The husband's action for loss of his wife's services is brought in the husband's own right; and yet the action will not lie if the wife consented to the injury. (2) On the other hand it is apparently not affected by the fact that the wife compromised her own claim after receiving the injury. (3) The action under the Fatal Accidents Acts is derivative in the sense that the deceased must have had an action if he had lived, and it is extinguished by a compromise made by the deceased after the cause of action arose. (4) On the other hand, it is not affected by prior agreement made by the victim of the tort limiting the amount of his recoverable damages. Rule (2) looks impolitic: if the wife has compromised her claim, without expressly reserving her husband's action, the defendant should be entitled to assume that he has got rid of the whole matter. To that extent, at least, the husband's action should be derivative. Rule (4) also looks wrong: if an exceptions clause is given any operation against dependants, it should be given the operation that its terms require. There is no sense in saying that a total exclusion of liability takes away the dependants' claim, but a restriction of liability to £1 does not restrict the dependants.

✓ Reverting to the question of contributory negligence, it seems that, on the whole, justice is best done by regarding the action as derivative, and therefore subjecting the husband to a reduction when he sues for expenses occasioned by injury to his contributorily-negligent wife. This action given to the husband is given to him specifically in his capacity as husband, in recognition of the unity of the family both emotionally and economically; and the defendant should thus be entitled to claim a reduction in his total liability to the family by reference to the contributory negligence of its member.

The way in which the law of contract operates creates an unsatisfactory excrescence upon recovery under the Fatal Accidents Acts. It has been settled as a matter of policy that recovery under the Acts is limited to pecuniary loss; and there is no special reason why a plaintiff who happens to have a claim in contract should

¹¹ *Mallett v. Dunn* [1949] 1 All E.R. 973. The opposite view is generally taken in the U.S.A. and Canada.

¹² Law Reform (Contributory Negligence) Act, 1945, s. 2 (4).

be in any better position. Yet in *Sellars v. Best*,¹³ a husband who sued in contract for the death of his wife was awarded £100 damages for loss of consortium, without proof of pecuniary loss. This special rule for contracts is a complicating factor in the law, and no valid reason can be given for differentiating between recovery in contract and in tort. It is, therefore, submitted that the position in contract should be assimilated to that in tort.

The abolition of the husband's action for loss of consortium caused by the defendant's negligence, if that is agreed upon, might lead to a reconsideration of the general question of heart-balm awarded to married persons against those who break up the marriage. Whereas most adulterers go scot-free, substantial damages are occasionally obtained in the divorce court, or in enticement actions. There will probably be general agreement with the view that claims of this type are distasteful. They are a survival of what Shaw called the morality of the Tenth Commandment, whereby "women are publicly classed with a man's house, his ox, and his ass, as his purchased chattels."¹⁴

In deciding upon the value of the enticement action, the following considerations are relevant. In the first place, the action does not seem to have filled a pressing need, for after its invention in 1745 there were only two reported instances of it before 1904¹⁵; the next was in 1923¹⁶; and there have been a few since. Except where the injured husband cannot prove adultery, or wants the extra publicity of an action in tort, or wants to be sure of keeping all the damages for himself, the enticement action offers no advantages to him over proceedings in the divorce court¹⁷; indeed, it is more difficult to win than a claim for adultery in the divorce court, since the plaintiff must show that the wife was enticed away—which means that the initiative in causing the wife to leave her husband must have been taken by the other man; in the divorce court, on the other hand, the fact of adultery is sufficient. Again, the enticement to be proved in the tort action must result in a continuing loss of consortium by the plaintiff; it is not enough to show that the wife committed adultery, or went to stay temporarily with another man, if she has not given up cohabitation with her husband.¹⁸

The extension of the enticement action to an injured wife might

¹³ [1954] 1 W.L.R. 913 at 919.

¹⁴ Preface to *Getting Married*.

¹⁵ *Smith v. Kaye* (1904) 20 T.L.R. 26.

¹⁶ *Sanderson v. Hudson*, *The Times*, January 29, 1923. See the review of the earlier cases by McCardie J. in *Place v. Searle*, *The Times*, March 24, 1932. In the course of his judgment, his lordship said: "Whatever may be the true basis of actions of enticement, it seems clear that, unless carefully watched and checked by the courts, they may easily develop into recognised methods of wrongful pressure and improper extortion."

¹⁷ It may be noted that a husband may claim damages for adultery in the divorce court without petitioning for divorce; this point is frequently overlooked.

¹⁸ Cf. *Newton v. Hardy* (1933) 149 L.T. 165; 49 T.L.R. 522.

have been socially of more importance than allowing the action to the injured husband, since a wife cannot claim damages in the divorce court for adultery committed by her husband. Even so, enticement actions by wives have been rare.¹⁹ Lawyers generally suppose that it is harder for a wife to succeed in an enticement action than for a husband, for the reason that jurors whose thinking is governed by stereotypes can more readily be convinced that a man entices a woman than that a woman entices a man.

Although the assessment of damages is often troublesome in tort, the task of putting a money value upon an erring spouse is more than usually difficult. It was held in a divorce case that where a husband had been able to turn his wife into an efficient partner in his business, his damages for adultery with her could include a sum in respect of the loss of his wife's prospective earnings.²⁰ (A clever wife will, of course, give up helping her husband before committing adultery.) Apart from such special circumstances, damages are at large, and the defendant will in effect be required to pay a bride price fixed by the judge or jury. This price will vary with the wealth and behaviour of the defendant, and may run between, say, £1,000 and as much as £7,000 or even more.²¹ Thus England is still the country that it was in Byron's time—

Where juries cast up what a wife is worth,
By laying whate'er sum, in mullet, may please on
The lover, who must pay a handsome price,
Because it is a marketable vice.²²

One of the paradoxes of the situation is that a husband who sues for the enticement of his wife will get more damages if she is of good character than if she is a worthless woman²³; this rule follows logically from the view that the wife is property, but it means that the wife in her new home may indirectly suffer for her own previous virtues. Just as it is to the advantage of the husband to stress the virtues of the wife-chattel he has lost, so the co-respondent will save his pocket if he can make it appear that the woman he has acquired is of worthless character and attainments; and the evidence adduced to prove this may sometimes be of a most unhappy character.²⁴

¹⁹ The extension to the wife took place in *Gray v. Gee* (1923) 39 T.L.R. 429, where, however, the wife failed to gain a verdict. In *Newton v. Hardy*, last note, there was a similar result. In *McElroy v. Grieve*, *The Times*, April 9, 1936, the wife was awarded £3,500; in *Welton v. Broadhead*, *The Times*, June 19, 1958, £1,500.

²⁰ *Scott v. Scott* [1957] P. 1 (C.A.), criticised in 73 L.Q.R. 141.

²¹ £7,500 were awarded in a divorce case recently: *Francis v. Francis*, *The Times*, March 21, 1959.

²² *Don Juan*, Canto I, lxiv.

²³ *Johnson v. Pollard*, *The Times*, July 30, 1955; *Francis v. Francis*, note 21.

²⁴ In *Arlet v. Arlet*, *The Times*, October 18, 1960, the co-respondent sought to establish that the wife, with whom he was then living, was "a worthless woman, a poor mother, a flighty and unfaithful wife, and a woman capable

Some change is needed, and it is submitted that the change should start by abolishing claims for enticement as such. If the law of divorce can be tackled, damages for adultery should be abolished as well. There are several reasons why the subject of damages for adultery need not be regarded as outside the competence of the Law Reform Committee. In the first place, Royal Commissions are appointed to consider the subject of dissolution of marriage rather than the question of damages for adultery. Secondly, the question of damages for adultery was until the year 1857 a common law action in trespass (for criminal conversation); this action was replaced by the remedy in the new divorce court. Thirdly, the remedy in damages in the divorce court was not made dependent upon the grant of divorce; it is possible to petition for damages for adultery without petitioning for divorce. It follows that if the Law Reform Committee made a recommendation on the subject of damages for adultery, it would in no way be tampering with the law of dissolution of marriage.

It is submitted that almost the only situation in which a deserted husband has a claim meriting to be considered by the law is where he has been left with young children to bring up, needing perhaps a nurse as well as a housekeeper. Even in this case, however, the present law does not work well. The damages recovered by a husband suing for enticement will not be invested by the court for the benefit of the children; it will be paid to the husband, avowedly to compensate him for the loss of his wife's affection. It may happen (it has happened) that the husband forthwith spends the money in a way which he considers to afford him the maximum solace. The position is better where damages are claimed for adultery, because here, by an illogical compromise on the part of the legislature, the court is empowered to direct the damages awarded to the aggrieved husband for the wrong done to him to be applied in whole or part for the benefit of the children, or even for the benefit of the guilty wife.

The need of the children of the marriage has, in truth, no connection with the legal problems of enticement and adultery. If it is the husband who deserts, he can already be reached under the machinery of the magistrates' courts and the divorce court, and the order is against him personally—not against the possible adventuress to whom he has deserted. Where it is the wife who deserts, she can now be made to pay maintenance for the children in divorce proceedings,²⁵ and the same rule has recently been extended

of giving way before marriage." Wrangham J. commented that the co-respondent had made some progress in the direction of establishing that case, and by way of recognition of this he reduced the damages of £1,000 claimed by the husband for adultery to £750, adding the hope that the co-respondent was satisfied with having demonstrated that the wife was comparatively worthless. It seems to me a cruel thing to put persons who may be of limited means into a dilemma of this kind.

²⁵ Latey, *Divorce*, 14th ed., p. 903.

to proceedings before justices.^{25a} It might be considered whether a maintenance order should be made enforceable against the wife's paramour or second husband.²⁶

Courage may be taken from what has already been done in other jurisdictions. New York, for example, has abolished actions for alienation of affections (the American term for enticement), criminal conversation, seduction and breach of promise.²⁷ Professor Bohlen's criticism of the common law explains the opinion that led to this change:

"There are certain actions designed to protect the marital interests, originally those of husbands only but today those of wives as well. Experience has shown that these actions, and particularly that of criminal conversation, have been constantly abused by making them a means of extortion and blackmail. The interest which is protected by the action of criminal conversation is archaic to the last degree, and is entirely repulsive to the modern concept of the marriage relation. The action is based on a husband's proprietary interest in the person of his wife which in all its incidents is as much a property interest as is the interest in the exclusive possession of his land and chattels. No man worthy of the name would think of exploiting his dishonor by seeking money damages from one who commits adultery with his wife. Whatever justification might have been found in the necessity of a form of action in which the fact of adultery could be established when divorce could be obtained only on that ground and then only by a private Act of Parliament, modern divorce laws have robbed it of this utility. The action as it stands has no place in any modern system of law and its persistent abuse cries aloud for abolition. It is, therefore, a matter for congratulation that within the last few years these actions have been abolished by statute in five states."²⁸

Turning to the question of parental rights, the age of the child's emancipation is a delicate human problem which the judges have not dealt with satisfactorily. Whereas public opinion has gradually moved in favour of curtailing parental rights, the judges

^{25a} Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 2 (1) (h).

²⁶ One other small point calls for comment. In an enticement action by a husband a few years ago, the judge took into account, in assessing damages, that the husband had transferred property into his wife's name: *Johnson v. Pollard*, *The Times*, July 30, 1955. It seems unsatisfactory that the adulterer should thus have to pay damages based on the wealth of the woman he is acquiring, since it is not certain that this wealth will be available to him. Nor is there any real need for the rule, because the divorce court in granting a divorce has power to vary settlements, including absolute assignments of property made between the spouses after marriage: *Halpern v. Halpern* [1951] P. 204.

²⁷ New York Civil Practice Act, Article 2A, section 61B. For other legislation see the literature cited in Prosser, *Torts*, 2nd ed., p. 697. Dean Prosser himself views the legislation with mixed feelings; and see the different views expressed in Mr. Payne's note in 21 M.L.R. 296.

²⁸ Bohlen in 50 *Harvard Law Review* 1246. See also the eloquent criticism of the common law in Prof. Edmond Cahn's *The Moral Derision* (London, 1959), pp. 106-110.

have gradually extended them. At first it was thought that the parent's right to detain his child against the child's will ended at fourteen. This was plainly too young, and the courts extended the age to sixteen, for no better reason than that that was the age mentioned in the criminal offence of abduction.²⁹ It might well have been thought that even sixteen was on the young side, and that eighteen might be a reasonable compromise between opposing considerations of policy. But the judges next took a jump to twenty-one; and that is how the law stands now.³⁰

Fixing the age at twenty-one is not of great importance where an action is brought to recover custody of the child, since the court will have regard to the welfare of the child,³¹ and the older the child is, the more important his wishes are in determining his welfare. But the age of emancipation may be decisive if the father is using force to detain his child against the child's will,³² or is suing a third party for damages for harbouring the child (on the basis of loss of services). It is not certain whether, in the latter action, the court is allowed to consider the welfare of the child.³³

Even the age of twenty-one does not represent the limit of parental rights in one respect. Although the child is emancipated from control at that age, no age limit is placed upon the action for seduction. In one case a married woman of eight years' standing, having separated from her husband, went back to live with her father and acted as his servant. She then carried on an illicit affair; and it was held that the father had an action against her lover for the seduction.³⁴ This absurd decision is matched by one at the other extreme, that a father cannot sue for loss of services if the child is too young to render services; consequently, he cannot in this action recover for medical expenses when his baby has been injured by the negligence of the defendant, though he may possibly have a special action on the case for those expenses.³⁵ It should not be left to litigants at the present day to debate these artificial problems resulting from the use of a fictitious form of action.

Seduction actions have gone out of fashion—they never were much in fashion—perhaps because of the emancipation of females, or reluctance to face publicity. A young woman is no longer regarded as her parents' property, and if she is seduced, part of the blame is likely to lie with her parents. What is needed, it is submitted, in place of the action is more generous provision for the illegitimate child by increasing the pecuniary limits of justices' jurisdiction—the maximum for an affiliation order at present is 50s. per week.

²⁹ *R. v. Howes* (1860) 2 El. & El. 333; *Mallinson v. Mallinson* (1866) L.R. 1 P. & D. 221.

³⁰ *Re Agar-Ellis* (1883) 24 Ch.D. 317; *Lough v. Ward* [1945] 2 All E.R. 338.

³¹ Guardianship of Infants Act, 1925, s. 1.

³² See *Lough v. Ward* at p. 348.

³³ *Ibid.* at p. 349.

³⁴ *Harper v. Luffkin* (1827) 7 B. & C. 387. No report states the age of the woman.

³⁵ *Hall v. Hollander* (1825) 4 B. & C. 660.

The skein of matters discussed so far could obviously be dealt with on a single reference to the Law Reform Committee,³⁶ and gathered together in a useful little measure called the Domestic Torts Act (not, please, the Law Reform (Domestic Torts) Act).

A piece of surgery is needed in respect of vicarious liability for independent contractors. The law at present is in such a state of uncertainty that it is almost impossible to expound. Moreover, it is highly questionable whether vicarious liability for contractors is ever justifiable. Conceivably a case might be made for it in one situation: where the plaintiff is claiming for personal injuries, and the defendant, the employer of the contractor, is insured. This is the situation that arises where an action is brought for personal injury resulting from a traffic accident, the defendant's vehicle having been badly repaired by an apparently competent mechanic. Yet in this situation the courts do not impose vicarious liability for contractors.

One of the oddest pieces of legal history is that consequent upon the decision of the House of Lords in *Wilsons & Clyde Coal Co. v. English*.³⁷ In order to curtail the doctrine of common employment, their lordships held that certain duties of the master were "personal" and therefore non-delegable; but this meant giving a new and highly artificial meaning to the phrase "personal duty." Before *Wilsons'* case, a personal duty meant a duty which could only be performed by the undertaker with his own hand and brain, so that it would be a breach of duty if he attempted to delegate performance to another. An example would be the duty of a surgeon, which he must perform himself and cannot contract out to others. The expression "personal duty" in *Wilsons'* case does not mean this, for it includes duties the performance of which the master not only may but must delegate. In *Wilsons'* case itself, the defendant colliery company was under a statutory duty to delegate the function in question to a colliery manager (a servant of the company); yet the duty which was thus required to be delegated was said by the House of Lords to be "personal" to the company!

It might have been thought that the fiction involved in *Wilsons'* case would have been discarded after the abolition of the doctrine of common employment, but unfortunately it has been allowed to survive the circumstances that gave it birth. During the nineteenth century, in *Dalton v. Angus*,³⁸ Lord Blackburn had invented the doctrine of non-delegable duty as a means of extending liability for contractors, and the hypnotic power of words means that the doctrine of non-delegable duty in *Wilsons'* case, used for the purpose of evading the doctrine of common employment, came to

³⁶ The rule barring actions in tort between husband and wife has already been referred to the Committee.

³⁷ [1938] A.C. 57.

³⁸ (1881) 6 App.Cas. 740 at 829.

be linked with the doctrine of non-delegable duty as a device for letting in the wider form of vicarious liability. This happened in *Paine v. Colne Valley Electricity Supply Co.*,³⁹ where Goddard L.J., sitting as an additional judge of the King's Bench Division, provided us with what is still the only authority for saying that the employer's threefold duty under *Wilsons'* case extends to liability for contractors. The decision on this question is vitiated by two circumstances. In the first place, the learned Lord Justice in effect found negligence against the employer⁴⁰; thus the ruling as to vicarious liability for contractors was unnecessary for the decision. In the second place, the so-called contractors were in fact a firm who had supplied electrical kiosks according to specifications; the contract between them and the employers was probably for the sale of goods rather than for work and materials; therefore, the ruling as to vicarious liability is overruled by the decision of the House of Lords in *Davie v. New Merton Board Mills Ltd.*,⁴¹ which holds that one who supplies goods under a contract of sale is not an independent contractor.

The speeches in the latter case leave the general question in some doubt. Viscount Simonds, Lord Morton and Lord Reid expressly held that *Wilsons'* case decided nothing as to vicarious liability for contractors, and Viscount Simonds stated that he was not deciding that question one way or the other. But Lord Tucker thought that an employer was liable for a contractor to whom the employer entrusted the performance of his personal duty; and Lord Reid said that an employer was in some cases liable for others than servants; he was liable for independent contractors, at least if the negligent workmanship of the contractor were discoverable on reasonable inspection.

There is at least one case that leans against the vicarious liability. In *Szumzyk v. Associated Tunnelling Co. Ltd.*,⁴² it was assumed that the employer was not liable if he had reasonably relied on the advice of an expert. All that is clear is that the question remains completely open.⁴³

The Law Reform Committee has already made a partial pronouncement against this type of liability, by proposing⁴⁴ the provision which became section 2 (4) (b) of the Occupiers' Liability

³⁹ [1938] 4 All E.R. 803 at 807.

⁴⁰ See at p. 808.

⁴¹ [1959] A.C. 604.

⁴² [1956] 1 W.L.R. 98.

⁴³ Perhaps the Occupiers' Liability Act has an indirect bearing upon it, for in abolishing this kind of vicarious liability in the case of occupiers, as appears to have been the intention, it may be taken as a kind of parliamentary declaration against the general notion of liability for contractors. The Act may also have a more specific importance, for it is possible to imagine facts in which the occupation duty, as regulated in the Act, overlaps the employer's duty.

⁴⁴ Law Reform Committee, Third Report (1954), Cmd. 9305, paras. 77 (ii), 78 (v).

Act, 1957. It must be confessed that this provision is drafted most curiously, but for that the Committee was not altogether responsible. The Committee proposed that the occupier should not be vicariously liable for the negligence of a contractor in respect of "the performance of any work of construction, maintenance or repair or other like operation on the premises." The Act gives effect to this by first providing that the occupier is under a common duty of care to visitors, and then providing that, for the purpose of deciding whether the common duty of care has been discharged, regard shall be had to all the circumstances. Two illustrations of this last proposition are given, of which the second declares in effect that the occupier is not vicariously liable for "damage caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier." It will be seen that the draftsman has omitted the words used by the Committee, "or other like operation on the premises," and the words of the illustration, if read by themselves, are capable of raising a number of problems. For example, suppose that a contractor is employed to demolish a building, in order to restore the green sward; it would seem to be impossible to hold that a work of destruction is a work of "construction, maintenance or repair"; yet plainly it should fall under the same principle. If an expert is employed to inspect the premises to see that they are safe, but negligently fails to report a danger, the liability for a resulting injury should fall on the expert, not on the occupier who employs him, yet the injury caused to a visitor is hardly due to the "faulty execution" of work. The proper result can be reached by reading these words in the Act as mere illustrations, as they are stated to be, and finding in the general scheme of the Act, as so illustrated, an intention to abolish any vicarious liability for contractors which may be found in the existing law.

This line of reasoning avoids the difficult question whether the common law did impose vicarious liability for contractors in these situations. It has, however, the consequence of by-passing completely the restrictive formula invented by the Law Reform Committee. Hence it would mean negating responsibility even where a contractor negligently creates a "danger of the entertainment," as when a contractor brought in to give a fireworks display negligently sets off a rocket at one of the spectators. No one can tell whether the courts will read the formula in the Act as still subject to *other* cases of vicarious responsibility for contractors at common law, in particular the doctrine of the employer's liability for "extra-hazardous acts."

What is needed is a more thoroughgoing investigation of the whole doctrine of liability for contractors. The two main rules found in the present law are so vague that they are hardly rules at

all. The rule that there is vicarious liability for independent contractors employed to perform "extra-hazardous acts" might sound sensible if it were not for the facts of the case which invented the doctrine. To say, as the Court of Appeal said,⁴⁵ that the taking of a flashlight photograph in a theatre is an extra-hazardous act—not merely hazardous, but extra-hazardous—seems to rob language of its meaning, because it leaves us with no expression for the catastrophic risks. The decision becomes all the more remarkable when compared with another case where there was assumed to be no special hazard in replacing the wheel of a lorry which was to be driven on the highway.⁴⁶ In any event, it has been generally agreed since *Read v. Lyons*⁴⁷ if not before, that principles of liability are not well based on a concept of special danger.

This short list of projects for the Law Reform Committee and for the legislature by no means exhausts the rules of the law of tort which might profitably receive attention, though it probably comprises the most urgent. Some day we may have a review of the liability of the landlord or vendor of dangerous premises, and of the law of nuisance and *Rylands v. Fletcher*. It may be said that most of the work of the Committee so far has lain in the removal of anomalies and pruning dead wood, rather than in the imaginative development of new rules. Perhaps the field of liability in tort to trespassers may provide the occasion for a more creative form of activity. We could do with a consolidation of the apportionment legislation—the Tortfeasors Act, the Contributory Negligence Act and the Maritime Conventions Act—into a redrafted apportionment statute. But there is no point in continuing the list; enough has probably been said to justify the remark with which the paper opened.

GLANVILLE WILLIAMS.*

⁴⁵ *Honeywill & Stein Ltd. v. Larkin Bros.* [1934] 1 K.B. 191.

⁴⁶ *Stennett v. Hancock* [1939] 2 All E.R. 578.

⁴⁷ [1947] A.C. 156.

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EQUITY AND THE LAW REFORM COMMITTEE

THERE is an apparent paradox in the idea that the collection of rules usually described as "the principles of equity" should be worthy of the attention of the Law Reform Committee; for it seems a little strange that a system developed with the object of modifying the stringency and rigidity of the common law, with its attendant notions of "conscience," "good faith" and "reasonable diligence," should itself be in need of reform; yet the reason for this paradox must be sought in the historical development of the system itself.

The preoccupation of equity in its formative period with the development and protection of the use came to an end when the use was circumscribed by the operation of the Statute of Uses. Deprived, temporarily at least, of a large portion of their jurisdiction, the Chancellors maintained their position in the legal firmament by imposing their ideas of conscience and fair dealing on those who sought to enforce their legal rights unjustly. The revival of the use under the name of the trust did nothing to diminish this interference, and the post-Restoration Chancellors occupied themselves in working out the details of what had now become an essential part of English jurisprudence. In this they were assisted by the existence of an inflexible land law and by the necessity of adapting the formal rules of the common law to the circumstances of the cases. The modern rule against perpetuities; the development of the equity of redemption; the enforcement of secret trusts; the restraint upon anticipation; and the clarification and manifold expansion of the equitable remedies of specific performance and the injunction, were examples of this ameliorating tendency. Nevertheless, when one excludes all those parts of equity which concern themselves with the creation and enforcement of trusts, one is left with a series of superficially disconnected principles. It is this very lack of cohesion, indeed, that serves to emphasise the complementary nature of the jurisdiction. As Maitland, the great advocate of "partnership" as opposed to "fusion," put it:

"Equity was not a self-sufficient system, at every point it presupposed the existence of Common Law. . . . If the legislature had passed a short act saying 'Equity is hereby abolished,' we might still have got on fairly well; in some respects our law would have been barbarous . . . but still the great elementary rights . . . would have been decently protected. . . . On the other hand had the legislature said

'Common Law is hereby abolished,' this decree . . . would have meant anarchy. At every point equity presupposed the existence of common law. . . . It is a collection of appendices between which there is no very close connexion."¹

The so-called "fusion" effected by the Judicature Acts has done nothing to minimise the dependence of equity on the common law. Fusion of the rules themselves, as opposed to the fusion of their administration in a single tribunal, was no new notion. It had been propounded by Mansfield and restated by Blackstone in the eighteenth century²; and it is not without its advocates at the present time.³ Yet old habits die hard. The Judicature Acts fused the courts of law and equity; they created a substantially uniform system of procedure and pleading; and they provided that in cases of "conflict or variance," the rules of equity should prevail. But there was nothing more than a fusion of jurisdiction, procedure and pleading; the substantive rules themselves remained. That this was not peculiar to the system as administered in England can be seen by reference to the parallel situation in what is now the Republic of Ireland, where, in 1924, a new hierarchy of courts was established. There, a government commission which was charged with recommending changes was reminded in its terms of reference that it should approach its task "untrammelled by any regard to any of the existing systems of judicature," yet it was content to confine its activities to changes in the formal structure of the courts, and the work equivalent to that of our Chancery Division continues to be carried out in that country by members of the judiciary assigned for that purpose. The traditions of the pre-Judicature Act situation have been perpetuated in our Divisions; and the fact that in Ireland Divisions themselves have been abolished has made no difference.

The truth of the matter is, of course, that the procedural fusion and the abolition of the distinction between the separate tribunals have not affected the difference in genesis between the rules evolved in those tribunals. The different technical approach to these rules, and the differences in the training of the men who practise in the separate fields, as has been pointed out by the present Master of the Rolls,⁴ will continue to militate against substantive fusion. Added to this, it is now generally admitted that it is no longer possible to invent new principles of equity; so in *Re Diplock*,⁵ it was said by the Court of Appeal that "if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the court administering equity

¹ *Equity*, p. 19.

² Cf. Holdsworth, H.E.L., XII, 584-605.

³ e.g., Lord Denning, "The Need for a New Equity" (1952) 5 C.L.P. 1; Lord Evershed, *The Court of Appeal in England*, p. 13; Viscount Simonds L.C. in *Tool Metal Co. v. Tungsten Electric Co.* [1955] 1 W.L.R. 761, 766.

⁴ "Equity after Fusion" (1948) 1 J.S.P.T.L. 180.

⁵ [1948] Ch. 465.

jurisdiction." Lastly, the application of the doctrine of precedent to the Court of Chancery within the last 150 years⁶ has done much to perpetuate the independent nature of equitable principles, and at the same time to abrogate the fluid nature of the rules themselves. Equity has become as stereotyped as the common law and is no longer capable of re-adapting itself to changing conditions without the assistance of the legislature. Such is the justification for the seeming paradox mentioned at the outset of this survey, and now it remains to be seen whether statutory reforms are necessary and how they can be effected. In one large area, indeed, that of the law of property, the 1925 Acts have done much to remove difficulties by substituting uniform statutory rules for the former parallel and sometimes conflicting rules of law and equity. Moreover, the attention of the Lord Chancellor's Committee has already been directed to one aspect of the law of trusts,⁷ arising out of the decision of the House of Lords in *Chapman v. Chapman*.⁸ But there are still a number of problems which would appear to be beyond the power of the judiciary to solve, and which must await the intervention of Parliament. The following list is not intended to exhaust the possibilities of law reform, but is indicative of the type of situation to which the attention of the legislature might be directed.

CONTRACTS AND THIRD PARTIES

The common law rule which became firmly established in the nineteenth century,⁹ to the effect that no one can be bound by or take the benefit of a contract to which he is not an original party, has been the subject-matter of many criticisms.¹⁰ The earlier Law Revision Committee went so far as to recommend that the rule itself might be relaxed and the third party given a direct right to sue on the contract if it purported "to confer a benefit" on him,¹¹ but this recommendation was not implemented. Apart from the judicial suggestion that a third party having a "sufficient interest" in such a contract can still enforce it at common law,¹² the method most frequently employed for mitigating its harshness is that of the constructive trust, *i.e.*, where equity can imply from a contract

⁶ T. Ellis Lewis, "The History of Judicial Precedent," 46 L.Q.R. 207, 341; 47 L.Q.R. 411; 48 L.Q.R. 230; W. H. D. Winder, "Precedent in Equity," 57 L.Q.R. 245.

⁷ Sixth Report ((1957) Cmnd. 310). *Cf.* Waters, "The Variation of Trusts" (1960) 13 C.L.P. 36. There have been similar recommendations for Scotland: Ninth Report ((1960) Cmnd. 1162).

⁸ [1954] A.C. 429.

⁹ *Tweddle v. Atkinson* (1861) 1 B. & S. 393; *Dunlop v. Selfridge* [1915] A.C. 847.

¹⁰ Corbin in 46 L.Q.R. 12; Marshall in (1950) 3 C.L.P. 42. The most recent discussion is Furmston in (1960) 23 M.L.R. 373.

¹¹ Sixth Report (1937), para. 50 (9).

¹² *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500, *per* Denning L.J. at 517; *Drive Yourself Hire Co. (London) Ltd. v. Strutt* [1954] 1 Q.B. 250, 272, *per* Denning L.J.; *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, 422, *per* Devlin J.

between X and Y for the benefit of Z the existence of a trust in favour of Z, then Z can sue as *cestui que trust*.¹³ The difficulty in such a situation, of course, is that since both X and Y are free to modify the terms of their contract by mutual agreement, it will be necessary for Z to prove that those parties intended to stabilise their rights and duties for his benefit beyond any possibility of modification. The notion of a trust in this context has been described as a "cumbrous fiction"¹⁴ and the unpredictability of its application has been emphasised.¹⁵ It is said, indeed, that at present the tide is running against the application of the concept of the trust to give a remedy in such cases and that "equity . . . is at present tending to throw away the weapon it has itself forged."¹⁶

There are at least two situations in which the non-availability of a remedy for a third party is productive of hardship:

(i) Under the well-known principle in *Kelner v. Baxter*,¹⁷ a company cannot enter into a contract before it is incorporated since it does not exist as a legal person; in the same way, it is not bound by contracts made by agents purporting to act on its behalf before its incorporation, and it may not ratify a contract so made. This rule operates very seriously against promoters, and at one time it was thought that equity had successfully invoked the existence of a trust in order to give a right of action or, at least, to allow a person who contracted with a company's promoter before incorporation to enforce his claim against the company by being subrogated to the promoter's right to an indemnity out of the company's assets for the costs of performing the contract.¹⁸ The case in question was distinguished, however, on the ground that the newly created company had agreed with the promoter that they would pay him a sum of money as trustee for the plaintiff third party.¹⁹

In these situations, it is thought, the existence of a remedy, either by the use of the trust concept or the agency concept, would be beneficial. The fact that the company was, in fact, not yet in existence should not impose any barrier to the raising of a trust, for in other contexts the existence of trusts for unborn persons is commonplace. None of the authorities would seem to go so far, however, and in at least one case, it was stated that there is no presumption in favour of such a trust.²⁰ On the other hand, there is clear authority for the proposition that the promoter may be in a fiduciary relation to the subscribers.²¹ If the promoter, in fact,

¹³ e.g., *Harmer v. Armstrong* [1934] Ch. 65.

¹⁴ Lord Wright in 55 L.Q.R. 189, 208.

¹⁵ Hanbury, *Modern Equity*, 5th ed., 66. Glanville Williams in 5 M.L.R. 123.

¹⁶ Hanbury, *loc. cit.*

¹⁷ (1866) L.R. 2 C.P. 174.

¹⁸ *Touche v. Metropolitan Warehousing Co.* (1871) L.R. 6 Ch. 671.

¹⁹ *Re Empress Engineering Co.* (1880) 16 Ch.D. 125.

²⁰ *Omnium Electric Palaces v. Baines* [1914] 1 Ch. 332, 347, per Sargant J.

²¹ *Re Leeds, etc. Theatre* [1902] 2 Ch. 809, 823, 825.

contracts as trustee for the unborn company, there is no reason in principle why the contract should not be enforced, and there are decisions in the United States to this effect.²² Such a doctrine, indeed, has been introduced by statute in the Union of South Africa.²³

(ii) Another class of case which is productive of grave inconvenience is that involving in the banking transaction known as the joint deposit receipt. If X deposits money in a bank to the joint account of X and Y, with the object of making a gift to Y, can Y claim the money from the bank? At first sight, the answer would seem to be a negative one. The relationship between X and the bank is a purely contractual one, and the mere fact that Y's name appears in the deposit receipt does not confer any contractual rights on him as against the bank. The cases in which Y has been held to have acquired rights against the bank have been those in which X has expressly declared himself to be a trustee for Y; those in which Y has been a person in whose favour equity would raise a presumption of advancement; and those in which it has been said that X manifested "an intention to benefit" Y. In addition, there have been instances in which the delivery of the indicia of title, the deposit receipt, has been construed either as a *donatio mortis causa* or, if Y is neither a volunteer nor a stranger, as a valid equitable assignment of a chose in action.²⁴ It has been stated that both "common sense and commercial convenience" require that Y should be able to claim the money,²⁵ but the reasoning in the most recent case on the point in the House of Lords, *McEvoy v. Belfast Banking Co.*,²⁶ is entirely unsatisfactory and, as Professor Hanbury has put it, "it would be an invidious task to dogmatise about what it actually decides."²⁷ As the law stands, it can scarcely be doubted that the mere inclusion of a third party's name in a deposit account, without more, will not confer any rights upon him; but if commercial convenience is to be served by such a change in the law, then it is worthy of further investigation.

INCONSISTENCIES IN THE DOCTRINE OF SECRET TRUSTS

It is well settled that a person who receives a gift of property by will, apparently beneficially, and who is informed by the testator during his lifetime that he is to hold the property on certain trusts, cannot keep it for his own benefit.²⁸ This type of secret trust, based on the principle that a man cannot benefit from his own

²² Gower, *Modern Company Law*, 2nd ed., 266n.

²³ Companies Act, 1926, s. 71 (No. 46 of 1926).

²⁴ Cf. Sheridan, "Reflections on Irish Deposit Receipts" (1951) 9 N.I.L.Q. 101; Montrose, "Joint Deposit Receipts" (1951) 9 N.I.L.Q. 148.

²⁵ Hanbury, *Modern Equity*, 5th ed., p. 61.

²⁶ [1935] A.C. 24.

²⁷ Hanbury, *op. cit.*, 140.

²⁸ *McCormick v. Grogan* (1869) L.R. 4 H.L. 82.

fraud, is quite logical in its effect, and does not give rise to any difficulty. There is another type of secret trust, however, sometimes called the "half-secret trust," in which the trustee appears on the face of the will as trustee, *i.e.*, the existence of the trust is indicated but the identity of the beneficiary is not. In this situation, the courts in England have drawn a distinction between those cases in which the identity of the beneficiary is communicated to the trustee before the making of the will, and those in which the communication is effected only after the will is made, though still in the testator's lifetime.

In the first class of case, the authorities are unanimous that the trustee is bound,²⁹ and this would appear to be in accord with reason and principle. The whole basis of the secret trust is that it is not a testamentary one, and that it arises by virtue of the personal obligation which the donee has undertaken, and which will be enforced by a court of equity. In the second class of case, however, it has been held that the trust is not binding on the donee. The distinction appears to have been first taken by Parker V.-C. in *Johnson v. Ball*,³⁰ and seems to have received the approval of the House of Lords in *Blackwell v. Blackwell*,³¹ albeit *obiter*, for it has been restated in *Re Keen*.³² If the obligation imposed on the trustee-donee is a personal one, it is difficult to see how the time of the communication can affect his conscience, provided always he becomes aware of the trust before the testator's death. This is the basis of the cases in which the donee takes beneficially on the face of the will.

This distinction is an illogical one; it is ignored in Ireland³³ and in the United States³⁴; and it would seem that it should be abrogated here.

FORMALITIES FOR THE ASSIGNMENT OF TRUSTS OF PERSONALTY

Finally, reference should be made to a number of doubts that have been raised by the decisions of the House of Lords in *Grey v. I.R.C.*³⁵ and *Oughtred v. I.R.C.*,³⁶ with regard to the formalities necessary for the assignment of equitable interests in personalty. Both of these cases turned on the liability of certain written instruments to bear *ad valorem* stamp duty, and were decided on the interpretation of the Law of Property Act, 1925, s. 53. In each of them, however, reference was made to the ways in which equitable interests in personalty might be assigned. In *Grey's* case,

²⁹ *Blackwell v. Blackwell* [1929] A.C. 318.

³⁰ (1851) 5 De G. & Sm. 85, 91.

³¹ [1929] A.C. 318, 331, *per* Lord Buckmaster.

³² [1937] Ch. 236.

³³ The cases are collected by Sheridan in 67 L.Q.R. 314. For the Irish law, *cf. Re King's Estate* (1888) 21 L.R.Ir. 273, 278, *per* Monroe J.

³⁴ *Restatement: Trusts*, Vol. I, p. 165.

³⁵ [1960] A.C. 1.

³⁶ [1960] A.C. 206.

at first instance, Upjohn J. referred with approval to the classification of Romer L.J. in *Timpson's Executors v. Yerbury*,³⁷ where he said that such an equitable interest can be disposed of in favour of a third party in any one of four different ways. The person entitled to it (a) can assign it to the third party directly, (b) can direct the trustee to hold the property in trust for the third party, (c) can contract for valuable consideration to assign the equitable interest to him, or (d) can declare himself to be a trustee for him of such interest.

Section 53 (1) (c) of the 1925 Act (which replaces section 9 of the Statute of Frauds, 1677) provides that "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing . . .," but section 53 (2) goes on to provide that this "does not affect the creation or operation of resulting, implied or constructive trusts." In Romer L.J.'s classification, mode (a) undoubtedly requires writing under section 53 (1) (c). Since *Grey's* case, it is settled that mode (b) also requires writing: before that decision it was clear that this was a valid assignment, but the formalities required were uncertain. *Oughtred's* case involved the application of mode (c), but the decision itself leaves doubtful whether, notwithstanding section 53 (2), the contract must be in writing. Moreover, so far as mode (d) is concerned, in *Grey's* case, Upjohn J. could see no distinction between it and the situation existing under mode (b), where the settlor directs his trustees to hold the property in trust for the third party. He thought that in either case, the trustees became trustees of the equitable interest for the third party and the settlor disappeared from the picture. It has been argued with great cogency³⁸ that a declaration of trust does not operate to transfer the equitable interest from the settlor to the third party, but rather that the former retains his equitable interest and a subsidiary equitable interest becomes vested in the latter. Alternatively, under mode (b), the settlor does disappear. The Court of Appeal was able to hold in *Grey's* case that the word "disposition" in section 53 (1) (c) was wide enough to cover mode (d), and this was affirmed by the House of Lords on a slightly different ground. The House, however, did not pass on the nature of a trust of a subsidiary equitable interest, and so this matter remains unresolved. At any rate, it is conceived, legislative guidance as to the precise scope of section 53 is desirable, in view of the fact that, in *Oughtred's* case, the necessity or otherwise of writing in cases where there is a contract to assign was left an open question.

V. T. H. DELANY.*

³⁷ [1936] 1 K.B. 645, 664.

³⁸ P. V. Baker in (1958) 74 L.Q.R. 180, 182; J. W. A. Thornely in [1960] C.L.J. 31, 35.

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CONVEYANCING AND THE PROPERTY ACTS OF 1925

THE group of statutes dealing with the law of property which came into force on January 1, 1926, commonly referred to as the Property Acts of 1925 though they include the unrepealed parts of the Law of Property Act, 1922, have now been in operation for over a generation. The majority of present-day practitioners in both branches of the profession have had no practical experience of the law obtaining before they took effect. During that period only comparatively minor amendments have been made to them, and those principally by the Law of Property (Amendment) Act, 1926, which was made retrospective to the coming into force of the principal Acts. Later amendments have for the most part been the result of changes in various branches of the law and not by reason of any shortcomings in these Acts themselves. Furthermore, save for a few topics, the number of reported cases in which these statutory provisions have had to be construed and applied has been few. This is particularly so as regards conveyancing, with which this article is concerned. There were a number of such cases in the years following the coming into force of the Acts but since 1939 they have been few indeed. Actions concerning the existence, construction and enforceability of contracts for the sale of land are frequently before the courts, but ordinarily they raise no question under the Property Acts, save perhaps that of compliance with section 40 of the Law of Property Act, 1925.

It would however be wrong to infer from the infrequency today in the Chancery Division of vendor and purchaser summonses that there are no difficult and unresolved questions upon the conveyancing provisions of the Property Acts. Arguments do frequently arise between the advisers of vendors and purchasers as to such matters as whether the vendor has deduced a good title, whether the purchaser is entitled to insist upon a particular objection or requisition and as to the parties to and form of the conveyance. But there are several reasons why such disputes are rarely carried as far as litigation. One is that today most contracts of sale of land incorporate one of the standard sets of general conditions, such as *The Law Society's Conditions of Sale* or *The National Conditions of Sale*, and these conditions normally confer upon the vendor a wide power of rescission should the purchaser insist upon any objection or requisition with which the vendor is unable or unwilling to comply. While there are limits upon the vendor's exercise of such a power it does mean in many cases that a purchaser anxious to get the property must accept such title as the vendor

has. On the other hand if it is the vendor who is anxious to see the matter completed he will do his best to satisfy his purchaser's requirements.

Another factor is that most conveyancing solicitors are busy and pressed for time and therefore reluctant to engage in litigation if it can be avoided, and most difficulties are therefore overcome by the goodwill of both parties. Frequently there is more than one way of making title to a property. Coupled with this last point is the fact that there are few really bad titles in existence—bad in the sense that there is a real possibility of the purchaser, if he accepts it, being subsequently evicted by some third person or having to discharge an undischarged incumbrance. The emphasis is now less on the investigation of title and more on the pre-contract inquiries, and generally speaking a purchaser's solicitor's time is more profitably spent in making a careful inspection of the property with a view to the precise ascertainment of boundaries and of possible easements and other third-party rights and in making local land searches and careful inquiries as to planning and other matters of the local authorities than in investigating the vendor's title after contracts have been exchanged, important as that investigation still is.

These factors require to be borne in mind when considering what, if any, changes in the conveyancing provisions of the Property Acts are now desirable. It may be said that no changes are necessary, because the present system, though not perfect, is working reasonably well, and as the aim is in time to make registration of title compulsory for the whole country any alterations will only be effective for a limited period. The spread of compulsory registration is however very slow, and solicitors are still reluctant to register titles voluntarily in areas where registration is not compulsory. Moreover most of the possible alterations in the law considered in this article would still be effective under a universal system of registration of title.

The most fundamental contribution made by the Property Acts to the simplification of conveyancing was undoubtedly the reduction in the number of legal estates to two, coupled with the provisions which ensure that save in the simplest cases the legal estate is vested in not more than four persons who upon a sale, lease or mortgage can overreach many equitable interests, which are transferred to the proceeds of sale, so that the purchaser may ignore these interests even if he has notice of them. There can be little doubt that this has had a considerable effect in simplifying conveyancing, the increase in technicality being more than compensated for by the shortening of the documents which have to be investigated by a purchaser's solicitor, a matter of great importance now that so much land, especially in or near the larger centres of population, has been divided up into quite small parcels, each with its separate and distinct title. Furthermore these small parcels of

land change hands far more frequently than did the older larger estates.

Has, however, the time not now come for considering whether a further major simplification cannot be effected by substituting a single form of settlement for the two forms now obtaining, the so-called strict settlement under the Settled Land Act, 1925, and the trust for sale? As the result partly of the extended definition of "settlement" contained in section 1 (1) of the Settled Land Act, 1925, rendering land settled land not only where it is limited in trust for persons in succession but also where it is subject to the family charges mentioned in paragraph (v) of the subsection or is held in trust for an infant in fee simple or for a term of years, and partly of the imposition of a trust for sale in the form of the statutory trusts in such cases as beneficial co-ownership, there are few cases today, save where the fee simple or term of years is vested beneficially in a single person of full age or in a personal representative, in which the land is neither settled land nor subject to a trust for sale. The principal cases where a simple trust may still exist are where the legal estate is vested in one person of full age as a trustee or nominee for another such person, and where the land is held upon charitable trusts, it having been held in *Re Booth and Southend-on-Sea Estate Company's Contract*¹ that section 29 (1) of the Settled Land Act, 1925, does not make charity land settled land further than is required to confer upon the trustees the Settled Land Act powers. Thus any simplification in the form of settlements would have far-reaching results.

It was natural for the framers of the 1925 legislation to retain the two principal forms of settlement then in use. The traditional form of settlement was long established and well known to land-owners and their advisers, and there would have been considerable opposition to any radical changes in its form. Now however the number of great settled estates is, as the result of sales brought about by taxation and other economic forces and of the formation of family companies, far less than it was, and moreover the traditional limitations of such a settlement are no longer popular, leading as they do in the case of large estates to the maximum incidence of both surtax and estate duty. The popular modern long term discretionary trust does not provide a tenant for life, and the usual persons to exercise the Settled Land Act powers in such a case are the trustees. On the other hand the use made by the 1925 Acts of the trust for sale has completely divorced that conception from its original roots. In most cases where a trust for sale is created the parties contemplate that the land will be retained indefinitely, and a solicitor often has difficulty in explaining to his client why a trust for sale is created. The Acts of 1925 by providing, *e.g.*, in section 205 (1) (xxix) of the Law of Property Act, 1925, that a trust for sale is not the less immediate for being

¹ [1927] 1 Ch. 579.

exercisable only at the request or with the consent of any person and for there being a power at discretion to postpone the sale make it clear that the procuring of an early sale is no necessary function of such a trust. Where however the proceeds of sale are held in trust for persons in possession absolutely, so that from the very creation of the trust there is no future period of distribution, it follows from the decision in *Re Ball*² that there is never any power to postpone the sale, and any one beneficiary can enforce a sale at any time.

The substantial difference between the strict settlement and the trust for sale is that in the former the legal estate and the powers of dealing with it are vested in the tenant for life, if there be one, while in the latter they are vested in the trustees; more important is the fact that in the former the initiative, the decision whether or not and how to exercise the powers, lies with the tenant for life and in the latter with the trustees. But the distinction is not clear cut. In many cases as the result of sections 23 and 26 of the Settled Land Act, 1925, the settled land and attendant powers are vested in the trustees of the settlement because there is no tenant for life, *e.g.*, because the immediate trust is a discretionary one or for accumulation, or because the tenant for life is an infant. Similarly in the case of the trust for sale, a considerable measure of control and initiative can be conferred upon the person for the time being beneficially entitled to the income by making the trust for sale, and therefore the additional powers conferred upon the trustees by section 28 (1) of the Law of Property Act, 1925, exercisable only at his request or with his consent, while under section 29 (1) the powers of leasing and management may be delegated by the trustees to the person entitled in possession to the net rents and profits. Provision for consulting with and giving effect to the wishes of beneficiaries is made by section 26 (3) but as amended by the 1926 Act this applies only to statutory trusts and to express trusts where the trust instrument so provides. Another difference between the strict settlement and the trust for sale, that under the former the interests of the beneficiaries are in the land and under the latter in the proceeds of sale, is now, in view of the substantial degree of assimilation between the law of realty and the law of personalty effected by the Property Acts, of little practical significance, though a trust for sale can cause the loss of agricultural relief in connection with estate duty.

It is the general view of practitioners that the trust for sale works better than the strict settlement, at least in the case of the smaller property. The vesting of the legal estate in the life tenant requires a vesting deed or vesting assent both at the commencement of the settlement and at every change of life tenant during the currency of the settlement, while even more important is the fact that upon the life tenant's death a special grant of probate or letters

² [1930] W.N. 111.

of administration limited to the settled land is necessary unless the settlement comes to an end on his death. The decision in *Re Bridgett & Hayes' Contract*³ that no such grant is required where the settlement comes to an end on the death has been of great benefit, though the other and principal ground of that decision, that if a general grant has been made, without any saving or exception of settled land, a purchaser from the general personal representative is protected whether or not a special grant ought to have been made, has proved equally useful. Then again, because owing to the provisions of section 30 of the Settled Land Act, 1925, the trustees of the trust instrument are not always trustees for the purposes of the Act, it is sometimes necessary to apply to the court for the appointment of such trustees, while upon every appointment of new trustees one requires not only the deed of appointment but also a deed of declaration pursuant to section 35 (1). While the expense of these matters may not be significant in the case of a large estate it is otherwise with a small one. On the other hand the machinery of the trust for sale is very simple; the legal estate is in the trustees throughout, new appointments are made by deed pursuant to the power conferred by section 36 (1) of the Trustee Act, 1925, whereupon the legal estate vests in the new trustees pursuant to the vesting declaration implied under section 40 (1), while separate appointments of the same persons as trustees of the legal estate and of the settlement of the proceeds of sale are (it is commonly assumed by practitioners) only required by section 35 (1) of the Trustee Act, 1925, if the trust for sale was in the first place created by two instruments.

Could not a single and simpler scheme be substituted for the present dual one, adopting the best features of each, by providing that wherever land is held in trust for persons in succession or subject to family charges or for the benefit of an infant or of two or more persons beneficially as joint tenants or tenants in common it shall be called settled land, and the legal estate shall be conveyed to or vested in not more than four persons jointly as trustees, such persons to have all the powers which are now described as the Settled Land Act powers? This would at one blow do away with the whole machinery of special grants limited to settled land, with its attendant body of rules of probate practice, and would render the devolution of the legal estate a simple matter save in a very few cases, *e.g.*, where a last surviving trustee disappears, or dies without a grant being taken to his estate, and there is no person nominated to appoint new trustees who is able and willing to act. Even these difficulties might be met in part by giving power to the beneficiaries or a proportion of them in such cases to appoint new trustees. It would also do away with the difference between ordinary trustees and Settled Land Act trustees; there seems little reason to continue this distinction.

³ [1928] Ch. 163.

As to the form of the instrument vesting the legal estate in the trustees, it should it is suggested have to contain similar statements and particulars to those now required in a vesting deed and set out in section 5 (1) of the Settled Land, Act, 1925 (a description of the land, a statement that it is vested in the grantees upon the trusts from time to time affecting it, the names of the trustees, any additional or larger powers, and the name of the person entitled to appoint new trustees). There seems no valid reason for requiring that the trusts shall be declared by a separate trust instrument. The requirement of section 4 (1) of the Settled Land Act, 1925, that a settlement shall be effected by two deeds is not found in the machinery of the trust for sale and its absence has not given rise to any difficulty. No doubt in practice where the trusts are complex and likely to be of some duration they would be declared in a separate instrument, since it would be inconvenient upon the sale of the land during the subsistence of the trusts to have to hand over the document declaring them. A provision to the effect of sections 72 (2) and 110 (2) of the Settled Land Act, 1925, would enable a purchaser to ignore the trusts even if set out in the conveyance of the legal estate.

The present substantial difference between the strict settlement and the trust for sale could be retained by permitting the conveyance to provide either that the statutory powers may only be exercised with the consent of a named person or persons, or as an alternative that they shall be exercised in accordance with the directions of some person or persons, equivalent to the present tenant for life. In this way where so desired the initiative could be reserved to the tenant for life of the land for the time being, the trustees being bound to comply with his proper directions. To avoid the necessity of a purchaser having to investigate the equitable interests it would be necessary to provide that the names of the persons from time to time entitled to give such directions, or alternatively whose consent is made necessary to the exercise of the powers, shall be stated in the conveyance or in endorsements thereon signed by the trustees, with a right for the tenant for life to compel the trustees to make the appropriate endorsement. The less important distinction between the strict settlement and the trust for sale, that under the former the equitable interests are in the land and under the latter in the proceeds of sale, could if thought desirable be preserved by permitting the conveyance to contain a declaration that the equitable interests shall for all purposes be transmissible and devolve as personal property, the reverse of section 75 (5) of the Settled Land Act, 1925.

To adopt a single form of settlement in this way would at once dispose of what has proved a considerable source of difficulty under the 1925 legislation, the precise line of demarcation between the strict settlement and the trust for sale. This difficulty arose from the varying constructions placed upon the word "binding" in the

expression "immediate binding trust for sale" which is, generally speaking, the only kind of trust for sale recognised by the Acts. A change in the law rendering unnecessary the further consideration of the decisions in *Re Leigh's Settled Estates*⁴; *Re Leigh's Settled Estates (No. 2)*⁵; *Re Parker's Settled Estates*⁶; *Re Norton*⁷ and *Re Sharpe's Deed of Release*⁸ would be as welcome to the practitioner as to the student. A single section, defining the overreaching powers of the trustees, could replace the present complex provisions governing the overreaching powers of an estate owner under the Settled Land Act and of trustees for sale, the latter sometimes depending upon whether the trust for sale is an express or a statutory one. In this connection consideration might well be given to the decision in *Weston v. Henshaw*,⁹ where a mortgagee took a legal mortgage from a borrower who had the legal fee simple vested in him. The borrower in fact held the legal estate as tenant for life under the Settled Land Act, but the mortgagee had no notice of this, there being produced to him a set of genuine title deeds concluding with a conveyance to the borrower in fee simple beneficially. The later deeds were concealed. It was held that as the land had been the subject of a vesting instrument and as the mortgage money was paid to the borrower and not to the trustees of the settlement the mortgage was by virtue of section 18 (1) of the Settled Land Act, 1925, void except as a mortgage of the borrower's own equitable life interest. Had the borrower been instead of a tenant for life the last survivor of trustees for sale it would seem that the mortgagee would have acquired a good title as a bona fide purchaser of the legal estate without notice of the relevant equitable interests. For the protection of purchasers it seems desirable that the law should be altered. Section 13, in avoiding dispositions of settled land made prior to the execution of a vesting instrument, expressly excludes dispositions made in favour of a purchaser of a legal estate without notice of any settlement.

Settlements of this nature would still be either simple or compound and it would therefore be necessary to retain section 31 of the Settled Land Act, 1925, or some similar provision for the purpose of defining the trustees of a compound settlement. It would also be desirable to retain some such provision as that now contained in section 1 of the Law of Property (Amendment) Act, 1926, though in its present form that provision is perhaps not altogether satisfactory. The object of the section is to ensure that a person beneficially entitled to the fee simple or a term of years subject to "family charges" of the kind defined in section 1 (1) (v) of the Settled Land Act, 1925, may, instead of operating the

⁴ [1926] Ch. 852.

⁵ [1927] 2 Ch. 13.

⁶ [1928] Ch. 247.

⁷ [1929] 1 Ch. 84.

⁸ [1939] Ch. 51.

⁹ [1950] Ch. 510.

full machinery of the Settled Land Act and overreaching the family charges, convey or create a legal estate subject to them. This is particularly useful where a small part of an estate has been purchased subject to, but with an indemnity against, a jointure or portions charge. The section however does no more than enable the estate owner to convey or create a legal estate subject to the charge, and should he die while the charge is still subsisting, strictly a special grant should be taken in respect of this land as settled land. Unfortunately the proper persons to take the grant are the trustees of the original settlement, with which the deceased will have had no real connection. This difficulty would however disappear if special grants were abolished.

One other matter for consideration would be the method of bringing a settlement to an end. The Settled Land Act, 1925, contains two provisions on this subject. If on the termination of the settlement the legal estate is vested in the person who has become solely and beneficially entitled, the trustees are pursuant to section 17 to execute a deed of discharge; if it is vested in some other person that person can pursuant to section 110 (5) convey it to, or assent to it vesting in, the person beneficially entitled, the conveyance or assent not naming any trustees of the settlement. In either case a purchaser is entitled to assume that the person in question is so entitled and need not, and indeed is not entitled to, investigate the equitable interests. Such a provision is clearly desirable but unfortunately there is no corresponding machinery applicable where a trust for sale is terminated, unless it be by way of partition pursuant to section 28 (3) of the Law of Property Act, 1925.

These reforms would it is thought simplify the present forms of settlement and much facilitate the devolution of the legal estate and the making of title. They would also go some way to shorten the Acts. A new Act would be required to replace the present Settled Land Act, 1925, and also those parts of the Law of Property Act, 1925, which deal with trusts for sale and co-ownership. Much of the present Settled Land Act is concerned with defining the statutory powers of the tenant for life, with the investment and application of capital moneys and the like, and these provisions would have to be retained. Some new transitional provisions would also be required. The transitional provisions of the Acts of 1925, and particularly those contained in part IV of the first schedule to the Law of Property Act, 1925, and applicable where land was at the end of 1925 held in undivided shares in possession, have given rise to more difficulties and a greater number of reported decisions than any other part of the Acts, and difficulties still occur quite frequently today, especially where the land has not been commercially dealt with since the coming into force of the Acts. While it seems too late to embark on any general revision of these

provisions a new provision for vesting in the trustees of the settlement any land which is settled land (in the wide sense proposed above) on the coming into force of the amending Act, with subsidiary provisions for the appointment by the beneficiaries or a proportion of them of such trustees where there would otherwise be none, might well avoid many of the difficulties which still come to light from time to time.

Another branch of conveyancing which might now be further simplified is that concerning mortgages. Is there any real reason for retaining the two forms of legal mortgage, that by demise and that by charge by way of legal mortgage? The latter charge was a new creation of the Law of Property Act, 1925, and no doubt it was then thought too revolutionary to impose it as the only form. Initially there was resistance to it on the part of some conveyancers, but today it is in general use, and has been adopted by very many building societies, who as a body tend to be conservative in their use of forms. Section 87 (1) of the Law of Property Act, 1925, providing that under such a charge the mortgagee shall have the same protection, powers and remedies, including the right to take proceedings to recover possession, as if the mortgage were by demise has been liberally construed, and no instance has emerged where a chargee by way of legal mortgage has been at a disadvantage compared with a mortgagee by demise. Thus in *Grand Junction Co. Ltd. v. Bates*¹⁰ it was held that such a chargee, in the case of leasehold land, is an "underlessee" for the purposes of section 146 (4) of the Law of Property Act, 1925, so that if the lessor takes steps to forfeit the lease, the chargee can apply to the court for relief. The legal charge is shorter, more logical and far simpler to explain to the lay client.

Whether it is necessary to retain sections 117 to 120 and the fourth schedule of the Law of Property Act, 1925, prescribing a form of statutory mortgage, seems very doubtful; the form has in practice been very little used. What would be of greater utility would be a provision for implying in all mortgages by deed, perhaps by the use of some such phrase as "as mortgagor," and subject to the provisions of the deed, certain covenants on the part of the borrower which are now common form. These include covenants to keep all buildings and fixtures comprised in the security in good and substantial repair, not to register the title without the consent of the mortgagee and, most important of all, to insure the buildings and fixtures. The provisions of sections 101 (1) (ii) and 108 of the Law of Property Act, 1925, are not regarded by conveyancers as satisfactory and are seldom relied upon, and it would be more satisfactory to imply a covenant on the borrower's part to insure the buildings and fixtures in their full value in the joint names of the borrower and the mortgagee in an

¹⁰ [1954] 2 Q.B. 160.

office to be approved by the latter, such consent not to be unreasonably withheld, to pay all necessary premiums and other moneys within a prescribed number of days of their becoming due, and to produce the policy and receipts on demand, with power for the mortgagee on default to insure and pay the premiums, all moneys so expended being repayable on demand with interest at the rate payable on the principal moneys and until repayment being charged on the mortgaged property.

Generally speaking the provisions of the Property Acts in regard to the priority of mortgages, and in particular the provisions as to tacking contained in section 94 of the Law of Property Act, 1925, seem to have worked satisfactorily, but there is one ambiguity which is well known though it has not yet had to be considered in any reported case. Section 97 of the Law of Property Act, 1925, provides that every mortgage affecting a legal estate in land whether legal or equitable, not being a mortgage protected by a deposit of title deeds, shall rank according to the date of registration as a land charge. But section 13 (2) of the Land Charges Act, 1925, makes any such mortgage void as against a purchaser, including a mortgagee, of the land unless it is registered as a land charge before the completion of the later transaction. Thus if mortgage A is completed on the 1st of a month and mortgage B on the 2nd, and mortgage A is registered on the 3rd and mortgage B on the 4th, section 97 gives the priority to mortgage A while section 13 (2) gives it to mortgage B. Various attempts have been made to reconcile this conflict¹¹ but none seem completely satisfactory. There are other difficulties under the Land Charges Act, 1925, but it is not proposed to go into them here as they have been considered by the Roxburgh Committee.¹²

There has been little difficulty with and few decisions upon the Administration of Estates Act, 1925, and in particular the new provisions as to assents contained in section 36. The decision in *Re Duce and Boots' Contract*¹³ that in section 36 (7) the expression "sufficient evidence" is not the equivalent of "conclusive evidence," so that if upon a proper investigation of title it appears that an assent has been made in favour of the wrong person a purchaser is not protected, caused a little alarm at first, there being some doubt as to what would constitute a proper investigation of title for this purpose. There seems no reason why the assent should not in favour of a purchaser be made conclusive, as is a vesting assent already by virtue of section 110 (2) of the Settled Land Act, 1925. Another question under section 36 which has not been resolved is whether the provisions of subsection (4) require writing in the case of an assent by a representative in his own favour,

¹¹ See *Megarry & Wade on Real Property*, 2nd ed., p. 922 *et seq.* and *Cheshire on Real Property*, 8th ed., p. 605.

¹² See the Report of the Committee on Land Charges (1956) Cmd. 9825.

¹³ [1937] Ch. 642.

whether beneficially or as a trustee for sale. The better opinion seems to be that, having regard to the use of the expressions "vesting," "vest" and "pass a legal estate" in the subsection, writing is not required in such a case. It also seems permissible to doubt whether the change in the character of the person holding the legal estate which occurs in such a case is the result of an assent at all, since in *Re Ponder*¹⁴ such a change took place, from the character of an administrator to that of a trustee, at a time when an administrator had no power to assent.

Whether a purchaser is invariably protected in the event of it later appearing that a grant of probate or letters of administration has been made to the wrong person is not altogether clear. The difficulty arises from the fact that upon the death of a testator leaving a will appointing an executor the property vests in that executor, subject to disclaimer, notwithstanding the making of a grant to some third party. It was held in *Hewson v. Shelley*¹⁵ that in such a case a purchaser from the personal representative gets a good title. The effect of this decision is now embodied in section 37 of the Administration of Estates Act, 1925, but that section only protects a purchaser who takes his conveyance directly from the person to whom the grant has been made. The provisions of section 27 are similarly limited. If therefore a grant is made to the wrong person, who in due course assents to certain property vesting in someone who is thought beneficially entitled thereto, but later proves not to be, and that person later sells the property to a purchaser, it is by no means clear that upon the subsequent revocation of the grant the purchaser would have a good defence to an action by an executor who had obtained a new grant of probate. The provisions of section 204 of the Law of Property Act, 1925, alone seem insufficient to afford a defence. This difficulty could be overcome by providing that a grant of probate or letters of administration shall vest all the deceased's property in the grantee if and so far as the same is not already vested in him. At the same time some alteration might be made in the scope of section 9 of the Administration of Estates Act, 1925, which provides that where a person dies intestate his estate pending a grant shall vest in the Probate judge. Thus the section does not apply where a testator leaves a will but has made no effective appointment of an executor, or where a sole administrator dies without having fully administered the estate. It might be more satisfactory to provide that the property of a deceased shall in all cases vest in the Probate judge unless and until it vests in an executor or administrator. This would simplify the service of notices to quit or of dissolution of partnership which often have to be served prior to the making of a grant, in which case it may be a matter of great difficulty to ascertain the person to serve.

¹⁴ [1921] 2 Ch. 59.

¹⁵ [1914] 2 Ch. 13.

The foregoing are some of the principal difficulties experienced by the writer under the 1925 legislation. There are many other points which give rise to argument from time to time but to attempt to enumerate them all would cause this article to degenerate into a catalogue. After the lapse of a generation the time seems to have arrived for a general reconsideration of the law and practice of conveyancing, and if the matter were referred to the Law Reform Committee there would be no lack of matter and suggestions for its consideration. By the time amending legislation is likely to be enacted a period nearly as long as that between the Acts of 1881 and 1882 and those of 1925 may well have elapsed.

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REGISTERED LAND REFORM

INTRODUCTION

SLOWLY but relentlessly this greatly cherished land of ours is becoming subject to the provisions of compulsory registration of title. The growth of this system, which began in the County of London in 1898, faltered, and then gained slight impetus after the 1925 property legislation, has steadily accelerated since the last war. Large areas of southern England (Middlesex, 1936; Surrey, 1952; Kent, 1957-61) have succumbed and the disease has even affected an isolated patch of northern England (Oldham, 1956) and there is the threat of contagion in the near future (Manchester and Salford). It is estimated that about one quarter of all conveyancing transactions in the country go through the Land Registry.

The opposition of many, but not all, unregistered land conveyancers has now been muffled and, perhaps, in a lifetime, the whole of England and Wales will be governed by the system. Books on land law will have to be rewritten within the registered land framework. The Land Registration Acts and H.M. Land Registry will be as familiar to the lawyer as the Income Tax Acts and the Inland Revenue are today!

The stealthy revolution to ancient conveyancing practice is taking place calmly and smoothly. The suspicious conveyancer, reared on unregistered land, quickly discovers that a bulky and dirty abstract of title (fruitlessly perused generation after generation by fresh legal minds) may generally be superseded by a short office copy of the Land Certificate. Once the art of Land Registry form-filling is acquired, the conveyancer accepts the new order content in the knowledge that the slightly reduced costs are more than balanced by the greater speed and simplicity. This very complacency, however, is a little disconcerting. "Unregistered land conveyancing is real law; registered land conveyancing is simple form manipulation." If this false view is accepted, an imperfect knowledge of the system will flourish. Lawyers must know what they are doing; deceptively easy transactions may cloud thought. There are still many legal problems in registered land transactions.

↓The object of land registration is to provide a method of creating and transferring interests in land which is simple, speedy and cheap. The cliché that the transfer of land should be as simple as the transfer of stocks and shares is often used. To this end the Land Registry examine the title of the owner of unregistered land (usually following the first purchase of the land after registration of title in that area becomes compulsory) and create a register of

the proprietor's title. This register defines the property and the estate owned by the proprietor and then specifies all the interests to which a transfer of the registered estate would be subject. Any purchaser for value from the registered proprietor gets exactly what is contained on the Register—the title to the goods and the defects and limitations (if any) are open for inspection on a state-guaranteed document. If there are any interests which affect the estate but which are not noted on the Register, then these may be ignored and defeated by the transaction. The owner of such a “minor interest” must ensure that it is noted on the Register if it is to be effective. However, this simple pattern is broken by the existence of the class of rights and liabilities known as “overriding interests” which bind the land whether they are noted on the Register or not. These interests will be discussed presently.

It is the proud boast of the Land Registry experts that the success of land registration depends upon three fundamental principles: the mirror principle, the curtain principle and the insurance principle. “The mirror principle involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title.”¹ The curtain principle embodies the familiar idea of keeping trusts off the title (*i.e.*, the Register). The insurance principle provides the state-guaranteed title and the consequent indemnity to any person who suffers loss if any mistakes occur.

The purpose of this paper is to look very broadly at the registered land system and, without discussing detail, to suggest for consideration improvements in general principles.

1. OVERRIDING INTERESTS

A major theoretical criticism must first be levelled at the mirror principle as it exists today—and then only because the principle is not complete. The ugly blot on the Land Registry escutcheon is the category of overriding interests. These interests are gathered together mainly in section 70 of the Land Registration Act, 1925,² and the diverse list includes rights of common, legal easements, public rights, the rights of persons in possession of land, rights acquired or in the course of being acquired under the Limitation Acts, local land charges and leases not exceeding twenty-one years granted at a rent without a fine. These are described by the Senior Land Registrar as “certain well-recognised burdens that are matters of common knowledge or are easily discoverable outside the register although they cannot, or cannot conveniently, be entered on it.”³

The mirror principle can never be complete until everything affecting the title (and the legal use and enjoyment of land) is

¹ T. B. F. Ruoff, *The Torrens System* (1957), p. 8.

² Hereinafter referred to as “the Act.”

³ Ruoff, *op. cit.*, p. 9.

reflected on the register. This means that the category of overriding interests ideally should be abolished, or, if this is not possible, drastically reduced. To have a series of interests, both legal and equitable, not on the register, which bind a legal owner of land regardless of notice⁴ is inconsistent with the whole concept of registered title. Various reasons have been put forward for the existence of overriding interests.⁵ One reason is that there is a danger of making the register too bulky. This is wrong. The fundamental purpose of registration is not to confine every title to one or two pages: the purpose is to put down in one place as simply as possible everything that is of present and future importance to the title. If a title is complex because there are many rights and liabilities affecting land, that is all the more reason why they should be expressed as clearly as possible in a place which is readily accessible to a purchaser. Mirrors do not conceal objects if the reflection is unpleasant. It is also said that the expense of making appropriate inquiries might be too great. This is a surprising statement from a body which is not only self-supporting but which emphasises its financial stability in spite of Land Registry fees being lower today than they were in 1914. The primary burden of investigating a title before registration falls upon the purchaser's solicitor who is required to send to the Land Registry all documents and details and in addition give a certificate as to his investigation of title. If there is any additional expense in making appropriate inquiries about overriding interests, the expense would appear to be negligible, and in any event it falls upon the purchaser. However, even if it were more expensive this is still no valid reason why overriding interests should be allowed to mar the simplicity and clearness of the registered land pattern. Certainly there would be problems of prescription, limitation and implied grants, but these are not problems which cannot be solved by methods other than making them overriding interests.⁶

In *The Law and Practice of Registered Land* (1958) by Sir George Curtis, the Chief Land Registrar, and Mr. Theodore B. F. Ruoff, the Senior Land Registrar,⁷ which is the standard practitioners' book on registered land and which may at least be described as semi-official, criticisms of overriding interests are discussed under the heading "Some Misconceptions."⁸ One misconception, the authors state, is that it is sometimes assumed that overriding interests are peculiar to registered conveyancing, whereas in fact

⁴ The vendor is, however, under a statutory duty—unless he has contracted out of it—to give full particulars of these interests to the purchaser.

⁵ e.g., Key & Elphinstone's *Precedents in Conveyancing*, 15th ed., Vol. 3, p. 19.

⁶ It might be possible to have a separate register for interests in the course of being acquired by prescription, limitation, etc., and the law changed so that time would not begin to run until a note of the right to be acquired is placed on the register. Some useful lessons might be learned from studying the Rights of Light Act, 1959.

⁷ Hereinafter referred to as "Curtis and Ruoff."

⁸ Curtis and Ruoff, p. 116.

they are by nature common to both systems of conveyancing. So what! The object of registered conveyancing is to change and thus simplify conveyancing. Why then defend its existence in registered land by saying that this system also occurs in unregistered land? Curtis and Ruoff further state that "overriding interests are an essential feature in registration of title if the reform introduced [by the Act] is to be confined to changes in the machinery of conveyancing only, leaving the substantive general law of real property untouched, and if registration of title is to be compatible with the continued existence of all those rights, privileges, conditions and charges permitted by the general law." Is it not being short-sighted to assume that registration of title is confined and should be confined to the machinery of conveyancing? Changes in substantive law occur in the present Act and it is very likely that future legislation will effect more substantive changes in land law to streamline registered conveyancing. Even today legal estates sometimes are manipulated expertly by the Land Registry in a way that would not be possible with unregistered land.⁹

Curtis and Ruoff mention that there have been suggestions that the Land Certificate ought to disclose what at present are overriding interests, but sneer at this by remarking that "one might expect Teutonic land records kept in that manner."¹⁰ Registered land in England must not be too efficient and all-embracing because it is not an English characteristic! The closing remarks of Curtis and Ruoff on this topic are that "to curtail the number of overriding interests would mean in the case of registered land depriving certain rights and interests of recognition, although if the title to the same land was not registered existence would be undoubted. This difference would cause hardship as well as confusion and would not be tolerated by the public which the registration system is intended to serve."¹¹ There is some truth in this, although it is difficult to imagine organised public resistance to land registration reform. How was the 1925 property legislation brought about? It may be, however, that the abolition or curtailment of overriding interests will have to wait until most of England is subject to compulsory land registration, but this change should come. Indeed Curtis and Ruoff indicate its desirability by pointing out that quite often overriding interests are referred to on the Register.¹²

Surely nothing is more desirable than the day when a purchaser looks at one Land Certificate, whether small or bulky, and sees on it

⁹ e.g., The famous Haigh Acid Bath Murder Case: Curtis and Ruoff, p. 850. The fact that the registered land system provides justice, whereas justice could not be done to all in unregistered land, still does not alter the fact that there is a change in substantive law. See also the decision of the Chief Land Registrar discussed by Mr. Ruoff in (1955) 19 Conv.(n.s.) p. 350: "Registered Land—Rectification and Indemnity."

¹⁰ Curtis and Ruoff, p. 117.

¹¹ Curtis and Ruoff, p. 117.

¹² See also *Registration of Title to Land*, H.M. Land Registry, 1960, p. 4.

(with the possibility of one or two obvious exceptions such as local land charges) everything that can affect his purchase.

2. LEASES

One of the most confusing topics in land registration is that relating to leases. The relevant provisions, sometimes seemingly conflicting, are scattered throughout the Act and many lawyers have delighted in highlighting the difficulties and doubts of statutory interpretation.¹³

The position relating to leases (which is also the official Land Registry view) is as follows:

(a) A lease originally granted for twenty-one years (or less), or a lease with only twenty-one years (or less) to run at the time of application *cannot* be registered, whether the land is in a compulsory or non-compulsory area (section 19 (2) (a)).

Such leases may be protected as overriding interests.¹⁴

(b) Leases over twenty-one years but less than forty years.

(i) Where the freehold or superior leasehold title is registered the lease *must* be completed by registration of the new title if the lessee is to obtain the legal estate (sections 20 and 23). This is imperative not only in a compulsory area, but also in an area of voluntary registration. The reason is that any "disposition" by a registered proprietor of land must be completed by registration, and the grant of a lease is a "disposition" (section 18 (1)).

(ii) Where the freehold or superior leasehold title is not registered then the lease *may* be registered.

(c) A lease for a term of forty years or more or an assignment on sale of leasehold land where the lease has not less than forty years to run *must* always be registered in a compulsory area, and also in a non-compulsory area if the freehold or superior leasehold title is registered.

If a lessee fails to register when compelled to do so, he will not obtain a legal estate in the land, although possibly he may be protected by having an overriding interest under section 70 (1) (g) if he is in actual occupation of the land or in receipt of the rents and profits thereof.¹⁵

¹³ "The Problem of Leases" (1936) 1 Conv.(N.S.) 344; (1928) 72 S.J. 96, 181; (1936) 80 S.J. 176, 396 and 496; (1957) 21 Conv.(N.S.) 474; Practice Note issued by the Joint Advisory Committee of the Law Society and Land Registry; Curtis and Ruoff, pp. 529-530.

¹⁴ Under s. 70 (1) (k): leases for any term or interest not exceeding 21 years, granted at a rent without taking a fine (what of leases for under 21 years where a premium has been taken, or, less commonly, where no rent is reserved?); or under s. 70 (1) (g): the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed (the scope of this paragraph still awaits judicial interpretation).

¹⁵ How many persons who have perpetually renewable leases or leases for lives and are aware of the provisions of the Law of Property Acts, 1922-25, which purport to give them the legal estate are also aware that these legal estates are withheld from them until registration?

The following criticisms and proposals for reform and simplification are tentatively put forward:

(a) To have different categories of "mays" and "musts" is confusing and pointless, especially when some "mays" mean "musts." No reasons appear to have been given for the distinction between leases of over and under forty years. If the Land Registry are perfectly willing to register a lease of, say, thirty-five years, at the option of the lessee, then such registration might just as well be made compulsory, and so avoid uncertainty. The law should be amended so that all leases over twenty-one years *must* be registered.

(b) It is constantly being emphasised that the object of land registration is to simplify and expedite the transfer of land. Most leases for very short terms are not transferred, and so it would be pointless to register a separate title for each short lease if this were the purpose. It is suggested, however, that the object of land registration should not be concerned exclusively with the transfer of land, but it should also be to provide a true record of legal titles, whether the transfer of that title is likely or not. In any event, to imply that leases under twenty-one years are rarely transferred is wrong. It is proposed, therefore, that leases granted for twenty-one years or less should be capable of registration. If this type of lease were to come within the class of registrable interests, then it would help to reduce a very large class of overriding interests in section 17 (1) (k) and so tie up with the suggestions already made concerning overriding interests. All these leases would be the subject of separate titles and would also be noted in the registers of the lessors' titles. But it would not be possible to register all leases without amending severely the substantive law of real property. Even if one were to accept the charge of Curtis and Ruoff of Teutonic efficiency, it would be neither necessary nor desirable to register as a separate title every minor legal estate such as a weekly or monthly tenancy. If one is to draw a line where should it be? Seven years would be a more realistic figure than twenty-one years, for seven-year leases and over are often transferred. To be a little bolder, why not enact that the only leases incapable of separate registration should be those leases which may be created informally under section 54 (2) of the Law of Property Act, 1925: *i.e.*, a lease which takes effect in possession for a term of not exceeding three years at the best rent reasonably obtainable without taking a fine? Since all other leases must be made by deed in order to create a legal estate, why not extend that rule and require registration as well?

(c) Leases containing an absolute prohibition against all dealings therewith *inter vivos* should be capable of being registered. This follows from the previous discussion.

3. RISK OF BUREAUCRATIC DOMINATION

Whether for better or worse, probably the former, the transfer of land is ceasing to look like a legal operation and is becoming a simple administrative operation. The countless variations in transfers to suit individual requirements become a matter for, and are settled within, the administration. Very few land registration problems reach the courts. This is very desirable for the parties to these problems, provided satisfactory solutions are reached and also that the solutions concern machinery only and not substantive law. It has been suggested earlier, however, that the Act and Rules have not merely provided a new machinery, but they have also introduced new principles which have affected the substantive land law. Are the legal problems which arise to be solved by an enlightened bureaucracy? There are many of these problems but the law reports offer only a handful of decisions to guide us authoritatively. It is desirable, however, for the benefit of land registration that cases do get into the courts. In Curtis and Ruoff the English system is preferred to the Australian system because in England "important practical problems of the kind that constantly bring applicants under the Torrens system into court are smoothly solved through administrative action on the part of the Chief Land Registrar. . . . In addition, the English Registrar possesses wide judicial powers of a kind and extent undreamed of elsewhere which he is not slow to use."¹⁶ If the courts are not allowed to pronounce on these matters the public may well be content to accept and be guided by the occasional directives from the Land Registry. This may ensure smooth working, but it is undesirable if legal principles remain ambiguous. Direction sometimes leads to dictation. Even now there are hints of condescension. Thus, Mr. Ruoff has mentioned that some feeling exists that judges do not have the same wealth of knowledge and the same practical grasp of conveyancing as of other branches of the law relating to land.¹⁷ This is an unhealthy attitude and if adopted by the Land Registry could lead to impatience and dogmatism. An example of such dogmatism concerns the classification of a lease containing an absolute prohibition against assignment. It has been reasoned that, with certain exceptions, this is a minor interest.¹⁸ In Curtis and Ruoff,¹⁹ after mentioning this, it is emphatically stated that "it is *not* . . . a minor interest." No reasons for this are given. The point itself does not matter. What does matter is the emphatic disagreement without giving reasons.

At present the Land Registry attitude is to give as much help and guidance as possible. Mr. Ruoff writes many articles on

¹⁶ Curtis and Ruoff, p. 12.

¹⁷ *The Torrens System*, p. 31.

¹⁸ (1929) 79 L.J. 324; Potter, *The Principles and Practice of Conveyancing under the Land Registration Act, 1925*, p. 243.

¹⁹ p. 146.

practice and occasionally notes a decision of the Chief Land Registrar. But this cannot take the place of reported decisions of High Court authority. How, then, can more cases reach the courts?

The Act confers a very wide jurisdiction on the Chief Land Registrar to hear and determine questions and disputes. Since these judicial powers are so wide it is provided that he may, if he thinks fit, instead of deciding the question himself, refer the matter to the High Court.²⁰ Since 1925 there have been only three such references.²¹ Surely there have been more than three cases worthy of a reference by the Chief Land Registrar to the High Court in thirty-five years! It is certainly true that rule 299 of the 1925 Rules provides that any person aggrieved by an order or decision of the Registrar may appeal to the court, but there have been no appeals for many years.²²

What is required is first a greater use by the Chief Land Registrar of his power to refer matters to the court, and, secondly, the issue of a regular series of reports of decisions of the Chief Land Registrar similar in style to the reports of the Lands Tribunal cases so that one may see the arguments put before the Registrar and the reasons for his decisions. In this way there could be an airing of the principles of land registration and practitioners would look more closely into matters instead of accepting Land Registry practice and directions as law.

4. METHODS OF EXTENSION OF REGISTRATION

In the coming years Orders in Council will be made extending compulsory registration of title to other areas. Generally, the making of the necessary Order in Council will depend upon the local authority for the area in question passing the necessary resolution.²³ Whether or not a resolution is passed may depend upon factors quite irrelevant to the main issue. This may be a truly democratic process, but it can also be quite chaotic. What is wanted is a gradual extension of compulsory registration in a logical and orderly way, without incurring too much cost or involving too great a delay in dealings. It is unlikely that local authorities are the best judges of when compulsory registration should reach them. The initiative should be transferred from the local authority to the Land Registry which is in the best position to know when the extension is desirable and practical, and, above all, it might then be able to cut down the delay in the registration of transactions. Local authorities certainly should be consulted: it is only the emphasis which should be changed.

²⁰ L.R. Rules, 1925, r. 298.

²¹ Curtis and Ruoff, p. 854; *Re Chowood's Registered Land* [1933] 1 Ch. 574; *Re 12, Regent Street, Oxford* [1948] Ch. 735; *Re 139, Deptford High Street* [1951] Ch. 884.

²² Curtis and Ruoff, p. 862.

²³ See L.R.A., 1925, ss. 120 to 125, and L.R.A., 1936, s. 1.

Delay is, at present, the most serious short-term criticism levelled at the system by practitioners. Recently new sub-offices have been opened in areas outside London to cope with local work and to relieve the heavy burden of work at the Land Registry in London. This may also help to reduce delay, and it has also been suggested ²⁴ that as a temporary measure voluntary registration of title might be suspended if there is any risk of interference with the work of the Registry in existing compulsory areas. This would be very inconvenient in some transactions in voluntary areas (*e.g.*, large building estates), but if the suspension would help in compulsory areas, it might be a useful measure.

CONCLUSION

The few reforms which have been proposed involve major changes of principle. Therefore the suggestions have been outline ones only. If any were to be accepted then there would be a great deal of consequential change of detail.

These suggestions are made with a view to improving a system which has already shown its undeniable advantages over unregistered conveyancing. The inevitability of a comprehensive land registration system is generally accepted.²⁵

Many critics scoff that the Land Registry deals only with the easy part of conveyancing and that the emphasis now in all conveyancing, registered and unregistered, is on pre-contract procedure. This is quite true, but registration still provides major simplification. The fact that there is much pre-contract work to do will be an added reason why the lawyer may still withhold his conveyancing practice from the grasp of do-it-yourself registered proprietors. Land registration is the most important step forward in land holding and conveyancing in our history. Methods of improving it must always be under consideration.²⁶

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²⁴ (1959) 103 S.J. 61.

²⁵ Thus the Roxburgh Committee on Land Charges ((1956) Cmd. 9825) could not suggest any solution, other than registration, to the problem which began in 1956 of how to discover incumbrances affecting unregistered land and registered in the Land Charges Department prior to a root of title 30 years old. The only recommendation was to press on as quickly as possible with the extension of compulsory registration until it covers all land in England and Wales.

²⁶ I should like to thank Dr. D. G. Valentine for his advice and criticism, although he does not necessarily agree with all that has been said.

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STATUTES

THE MATRIMONIAL PROCEEDINGS (MAGISTRATES' COURTS) ACT, 1960

THIS is far more than a consolidating statute. It incorporates fundamental changes in the law and various amendments in both law and procedure relating to matrimonial proceedings in magistrates' courts. Consolidation and some changes were recommended by the Royal Commission on Marriage and Divorce,¹ and the present Act is modelled fairly closely on the draft Bill prepared by the departmental committee under the chairmanship of Arthian Davies J., which reported in 1959.² When it comes into operation³ the new Act will provide some new remedies and blot out some unfortunate drafting and some bad decisions.⁴ It will even (sad though the passing of such an absurdity may appear) remove the matrimonial law of England from the purview of the (liquor) Licensing Acts.

The draft Bill on which the Act is based showed a genuine attempt to look afresh at the basis of complaints in the magistrates' courts and the remedies they may offer. It also marked a further development of the realisation, in recent matrimonial legislation,⁵ of the idea of protection for infant children as such, their interests being no long regarded exclusively as an extension of the personal rights of their mothers. The considerable overlap of interests of wives and children is no longer thought to justify the assumption of absolute identity of interest in all circumstances.

A major amendment to the law is that for the first time a husband may complain to the magistrates that his wife has "wilfully neglected to provide, or to make a proper contribution towards, reasonable maintenance" for the husband or any "child of the family"⁶ where, by reason of the impairment of the husband's earning capacity through age, illness, or disability of mind

¹ Cmd. 9678 of 1954, paragraph 1018, p. 267: "the time is ripe for a consolidation of the various statutory provisions and we therefore recommend that the substantive law with regard to the jurisdiction and powers of magistrates' courts should be codified."

² Cmd. 638.

³ On January 1, 1961: S.I. 2223 of 1960, issued under s. 19 (3) of the Act.

⁴ e.g., *Evans v. Evans* [1948] 1 K.B. 175 and *Marczuk v. Marczuk* [1956] P. 217, both of which arose—without inevitability—from unfortunate drafting in the previous legislation. And see note 17, *post*.

⁵ e.g., the Matrimonial Proceedings (Children) Act, 1958. This line of development appears to have been initiated by the Report of the Committee on Procedure in Matrimonial Causes, under the chairmanship of Denning L.J., Cmd. 7024 of 1947.

⁶ Defined in s. 16 as meaning (a) any child of both parties and (b) any other child of either party who has been accepted as one of the family by the other party. The same section defines a child as including an illegitimate or adopted child, but not a child adopted by third parties. The net effect is to

or body," it is "reasonable in all the circumstances to expect the wife so to provide or contribute."⁷ The "matrimonial orders"⁸ that the magistrates may now make include in such circumstances orders for the payment of maintenance by the wife as well as the husband,⁹ and the maximum amount of maintenance has been increased from £5 to £7 10s. a week for a spouse and from £1 10s. to £2 10s. from either husband or wife for a child. This shift from an assumption of dependence to an assumption of responsibility is a landmark in the progress of the married woman towards full legal personality.

Unfortunately the wording of the section referring to maintenance for children,¹⁰ in departing from that suggested by the Davies Committee¹¹ has become so clumsy and ambiguous that it is not clear whether the sum of £2 10s. is the maximum which either or both parties can be ordered to pay, giving a maximum aggregate of £5, or whether £2 10s. is the maximum total.¹² The fact that the word "aggregate" has been omitted suggests that each party might be ordered to pay £2 10s., making a total of £5. The consequential amendments to the Maintenance Orders Act, 1958, s. 4 (3)¹³ and the Guardianship of Infants Acts, 1886-1951¹⁴ do not help in construing the wording, but the new power to commit a child to the care of the local authority suggests that an aggregate maximum of £5 for a child's maintenance might be by no means too high.¹⁵ The unsatisfactory parent is not necessarily

equate the children within the provisions of the Act with those covered by the Matrimonial Causes Act, 1950, s. 26, as amended by the Matrimonial Proceedings (Children) Act, 1958, s. 1 (1), except that the jurisdiction of the magistrates is limited to infant children.

⁷ s. 1 (1) (i).

⁸ This is the term used in the Act and defined in s. 16 as an order under s. 2 or a variation under s. 8 of such order.

⁹ s. 2 (1) (c).

¹⁰ s. 2 (1) (h).

¹¹ This referred to "a provision for the making by the defendant or by the complainant or by each of them, for the maintenance of any child of both parties, of payments by way of a weekly sum not exceeding in the case of any one child an aggregate of thirty shillings." The committee unanimously considered (Cmnd. 638, paragraph 8) that the former maximum ought to be increased, but did not suggest a higher figure "because the question seems to us one of general social policy depending on considerations which in some respects go beyond our terms of reference."

¹² The wording is: "a provision for the making by the defendant or by the complainant or by each of them, for the maintenance of any child of the family, of payments by way of a weekly sum not exceeding in the case of payments by either one of the parties in respect of any one child the sum of fifty shillings."

¹³ By s. 15 (b), substituting the words "seven pounds ten shillings" for "five pounds" and "fifty shillings" for "thirty shillings." No consequential amendments have been made to s. 1 (4) of the Maintenance Agreements Act, 1957.

¹⁴ s. 15 (a), which effects a corresponding amendment also of the Affiliation Proceedings Act, 1957, making the maximum recoverable in respect of an illegitimate child fifty shillings instead of thirty shillings.

¹⁵ According to Cmnd. 914 of 1959, in 1957-58 the average weekly cost to local authorities for each child in their care was £1 16s. 2d. for children boarded out, £7 12s. 9d. for children in local authority homes and £3 6s. 2d. for children in voluntary homes. This strongly suggests that those who accept foster children do so without payment for some at least of their time and trouble.

unable to support his children, and there seems no good reason why failure to discharge general responsibility in regard to the child should result in any transfer of financial responsibility, within the parent's means, to other individuals or to public funds.

It is still provided that no matrimonial order (except one committing children to the custody of a third party or to the care of a local authority or placing them under supervision) shall be enforceable and no liability shall accrue under it while the spouses are cohabiting,¹⁶ but the old rules¹⁷ that, at a time of acute housing shortage, forced a wife to elect between her common law right to live under her husband's roof and her statutory right to claim maintenance from him for herself and her infant children, have been belatedly buried.

Perhaps the most far-reaching changes in the new Act are those extending the magistrates' power to deal with children of the family of any persons in respect of whom they begin to hear any complaint.¹⁸ This means that the powers are independent of the relief sought by the complaint and of whether or not it is granted.¹⁹ In particular, the power to make provision for the legal custody of such a child is extended "if it appears to the court that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties or to any individual" to include a power to commit the child to the care of a specified local authority until the age of eighteen.²⁰ Such an order may be made only after giving notice to the authority and hearing its representations, particularly as to maintenance payments. With some exceptions, a child so committed will be in a position similar to that of a child taken into care by the local authority under the Children Act, 1948, s. 1.²¹ Moreover, when

¹⁶ s. 7. The Royal Commission, with one dissident (whose views provide powerful support for the majority view) recommended that a maintenance order should be obtainable and enforceable during full cohabitation (Cmd. 9678, paragraph 1045), but the Davies Committee did not feel justified in including such a provision in the draft Bill.

¹⁷ Before these are finally interred it may be useful to recapitulate their main features as a warning for the future. The Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4), provided that no maintenance order should be enforceable whilst the married woman resided with her husband. The judicial gloss was that she was residing with him so long as she remained under the same roof although in a separate household, and even though the facts might be sufficient to establish desertion (*Evans v. Evans* [1948] 1 K.B. 175), but not if she was under a separate roof when the order was made and subsequently returned to a shared roof (*Thomas v. Thomas* [1948] 2 K.B. 294) nor if one party moved from the shared roof within three months of the date of the order and subsequently returned (*Hewitt v. Hewitt* [1953] 2 Q.B. 627).

¹⁸ s. 4 (1). This covers the hearing not only of an original complaint by either party but applies to an application for the variation or revocation of an order already made provided this refers to a variation of provisions for the custody of a child.

¹⁹ See Cmnd. 638, p. 33, notes on clause 4 of the draft Bill.

²⁰ s. 2 (1) (e) and s. 3 (4). There does not appear to be any corresponding power under the Guardianship of Infants Acts, 1886-1951.

²¹ s. 3 (1) and (2).

committing a child to the custody of an individual (not a local authority), the court may provide that the child should be under the supervision of a probation officer or local authority.²² Provision may also be made for access to the child by a party to the proceedings or other parent of the child,²³ and the increased maintenance provisions already referred to apply.²⁴ Detailed provisions have been made²⁵ to enable the court to obtain further information before making an order for custody or care of or access to a child. The magistrates may call for a report from a probation officer or officer of a local authority, which must be given or read aloud in court, and may include evidence not otherwise admissible so long as it relates to matters specified by the court. The parties (or any parent of the child) may challenge such a report²⁶ and produce evidence; in this event the report must be supported by the officer's evidence on oath. Statements made by the parties in the presence of the officer during reconciliation efforts are privileged from inclusion except by the consent of the parties.²⁷ These provisions are an expansion of the provisions of section 60 of the Magistrates' Courts Act, 1952, regarding a probation officer's report on the parties' means. They represent an imaginative and welcome attempt to admit evidence relevant to the welfare of children (and not limit it, as in the past, to such matters as the adult parties chose to bring before the court in their own interests), while providing safeguards for the individual against prejudice from secret reports which may vitally affect his interests. Only experience will show how far safeguards which are considered adequate for the adult individual can be applied without driving public servants to take refuge in inoffensive meaninglessness.

Other amendments concern revocation, revival and variation of orders.²⁸ In particular the High Court may, in subsequent proceedings between the parties, terminate the operation of a matrimonial order. Proceedings for revocation or reduction of maintenance payments may be taken against a party who is

²² s. 2 (1) (f). This perpetuates the division of supervision between probation officers and children's officers.

²³ s. 2 (1) (g).

²⁴ See notes 11-15, *supra*. While the child is under sixteen, maintenance is payable to the person having legal custody. A child over sixteen but under twenty-one may be a dependant and entitled to maintenance if he is receiving full time educational instruction or training or if his earning capacity is impaired through illness or disability; in that event maintenance may be payable directly to him: s. 2 (1) (h) (ii)

²⁵ s. 4 (2)-(6).

²⁶ s. 4 (3). The Davies Committee considered that where power to make provisions for the children was exercisable it would be desirable to provide by rule that the summons should include a warning to the parties of the existence of the power and a mention of their right to be heard. Cmnd. 638, p. 33. A parent does not include the father of an illegitimate child unless he has been so adjudged by a court.

²⁷ s. 4 (5).

²⁸ ss. 7-10. In particular fresh evidence is no longer required for variation of the order.

resident outside England²⁹ and may be initiated by a parent, custodian, or supervisor of a child, as well as by the parties to the marriage. The magistrates' power to make interim orders is also extended.³⁰

Many of the matrimonial offences of which complaint may be made have been redefined. Many more kinds of assault may now ground a complaint. Conviction on indictment of any assault on the complainant, or conviction by a magistrates' court of an assault on the complainant under the Offences Against the Person Act, 1861, s. 20, or section 42 if a sentence of imprisonment or other form of detention for not less than a month was imposed, or section 43 (aggravated assaults on women or children) or section 47 (occasioning bodily harm) are now all included, as well as an attempted or completed offence under sections 1-29 of the Sexual Offences Act, 1956, or under section 1 of the Indecency with Children Act, 1960, against an infant child of the complainant or against an infant child of the defendant who, at the time of the offence or attempt, was a child of the family.³¹ Persistent cruelty to children is to include offences against the defendant's children who were children of the family at the time of the offence.³²

Several changes have been effected in respect of habitual drunkenness or drug addiction. In the first place, as recommended by the Royal Commission,³³ the offence has been widened to include not only the spouse whose addiction makes him "at times dangerous to himself or to others, or incapable of managing himself or his affairs," but also one who "so conducts himself that it would not be reasonable to expect a spouse of ordinary sensibilities to continue to cohabit with him." The fact that such an amendment could be made speaks volumes for the reduction of drunken habits within the present century, and it can only be hoped that magistrates will be able to reach sufficient agreement among themselves about how much drunkenness is reasonable at any particular time to make the amendment effective and its application tolerably uniform.³⁴ But if the definition of the offence has been widened, so has the definition of those excepted from it. Under the previous legislation, an habitual drunkard or drug addict means "a person who, not being amenable to any jurisdiction in lunacy, is . . . at times dangerous. . . ." Under the new Act, such an addict means "a person (not being a mentally disordered person within the meaning of the Mental Health Act, 1959)

²⁹ s. 9 (3). It is expressly provided that the court may not vary an order by adding a separation clause against a person resident abroad.

³⁰ s. 6.

³¹ s. 1 (1) (c).

³² s. 1 (1) (b) (iii).

³³ Cmd. 9678, paragraph 1028, following Cmd. 6478, paragraph 156.

³⁴ The Davies Committee was divided in opinion as to the definitions of addiction and did not recommend a wider definition because "there would be a danger that any form of words adopted to define the new cause of complaint would tend to receive different interpretations in different magistrates' courts." Cmd. 638, p. 27.

who . . . is at times dangerous. . . ." Mental disorder has been given a very wide definition under the Mental Health Act, 1959,³⁵ and means "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind." Psychopathic disorder is defined as meaning "a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient and requires or is susceptible to mental treatment." There is a specific provision that promiscuity or other immoral conduct does not of itself constitute mental disorder. However desirable this wider definition may be for the treatment of the mentally disordered, it seems undesirable to exempt such a wide class of persons from the operation of matrimonial proceedings. Once the Mental Health Act, 1959, has replaced the Lunacy Acts, some different criterion for those whose irresponsible behaviour should be excluded from addiction to drink or drugs is clearly required. The question of where to draw the new line is of course a difficult one, but it seems most unfortunate that the problem appears not even to have been recognised, far less solved.³⁶ This is another example of doubtful drafting in the Act when there was no form of words proposed by the Davies Committee, and it seems probable that the widening of this exemption clause will largely nullify the effect of the wider definition of addiction.

A useful reform is that it is now only when the court makes a separation order on grounds of addiction that it can order the complainant to pay maintenance for the defendant.³⁷

Several amendments have also been made in regard to adultery, the different results of which in the High Court and the magistrates' courts respectively, form one of the outstanding anomalies still remaining in English family law.^{37a} As recommended by the Royal Commission,³⁸ the time limit for complaining of this offence is now six months from the date when the act first became known to the complainant, and there are provisions for relaxation of the time limit on production of evidence that the complainant has been outside the United Kingdom during that period.³⁹ The bars to relief on this ground no longer include collusion by the complainant, and one can only marvel that such a bar was ever imposed in the magistrates' courts. Adultery by the complainant is still an absolute bar to relief except where there is condonation

³⁵ s. 4.

³⁶ The Davies Committee pointed out (Cmd. 638, p. 32) that "drunkenness or drug addiction may be to some extent the result of weakness rather than wickedness and comparable to illness." They are clearly close to mental illness as now defined.

³⁷ s. 2 (2).

^{37a} See, e.g., *Miller v. Miller* [1960] 3 W.L.R. 658.

³⁸ Cmd. 9678, paragraph 1026.

³⁹ s. 12 (2) and (3).

or connivance or wilful neglect or misconduct conducing to it,⁴⁰ but where an order has been made the court can only revoke it if the complainant has committed adultery during the subsistence of the marriage (and not after divorce) and only at the request of the person who was the defendant to the proceedings in which the order was made and not then if the court thinks that person has condoned, connived at, or by wilful neglect or misconduct conducing to the adultery. Orders concerning the custody, care or maintenance of children need in any event no longer be revoked in case of adultery by the original complainant.⁴¹

A complaint based on sexual intercourse while the defendant was knowingly suffering from venereal disease has been widened to include not only the case where the defendant has insisted upon such intercourse, but also where (presumably she) "has without the complainant being aware of the presence of that disease permitted" intercourse.⁴² Similarly a wife may now complain not only that a husband has compelled her to submit herself to prostitution but also that he "has been guilty of such conduct as was likely to result and has resulted in the wife's submitting herself to prostitution."⁴³

The courts which have jurisdiction to hear complaints are those in which either party ordinarily resides at the date when the complaint is made, or those in which the cause of complaint wholly or partly arose or the offence or attempted offence occurred.⁴⁴ Here the major amendment is to deprive of jurisdiction the court acting for the area in which a conviction for assault took place. The Davies Committee pointed out that the court of conviction is fortuitous,⁴⁵ and on matters of procedure no less than of law it is very desirable to remove unnecessary technicalities and archaisms from legislation which affects thousands of people in their everyday lives.

O. M. STONE.

CARAVAN SITES AND CONTROL OF DEVELOPMENT ACT, 1960

THIS Act is divided into two unrelated parts. Part I introduces a new system for the regulation of caravan sites. Part II makes certain improvements to the enforcement machinery provided by the Town and Country Planning Act, 1947.

CARAVAN SITES

In November 1959 there was published a report by Sir Arton Wilson which embodied the results of an investigation into the

⁴⁰ s. 2 (3) (b).

⁴¹ s. 8 (2) (b).

⁴² s. 1 (1) (e).

⁴³ s. 1 (1) (g).

⁴⁴ s. 1 (2).

⁴⁵ Cmnd. 638, p. 28.

problems of caravan living which had been commissioned by the Minister of Housing and Local Government.¹ Sir Arton Wilson discovered that all the organised interests concerned with those problems were in agreement that "the existing situation with regard to residential caravanning is full of difficulties and dangers that call for urgent government action."² The principal cause of the difficulties and dangers was found to be the notorious inadequacy of the law concerning caravans and caravan sites.³ Neither the public health authority nor the planning authority was invested with any effective power to control the use and growth of caravan sites within its district. The lack of such power was a temptation to those site operators who were careless of local amenity, planned population figures and the welfare of caravanners, but who desired to profit from the demand for caravan sites. The ease with which an inappropriate site could be used to satisfy that desire is shown by the estimate that one-sixth of all residential caravans in England and Wales were in 1959 located upon sites operated in contravention of planning control.⁴ The lack of sanction for a failure to provide reasonable facilities for the individual caravanners is shown by the finding that "local authorities in general have little confidence in their power under the Public Health Act to secure that caravan sites . . . are equipped and maintained to a proper standard."⁵ The size of the problem and the seriousness of the difficulties to which the lack of regulatory power gave rise may be appreciated from the estimate that in 1959 one in 300 of the total population in England and Wales (vagrants apart) lived in a caravan.⁶

The system of regulation introduced by the 1960 Act is a system of site licensing which is to operate in substitution for the ineffective system provided by the Public Health Act, 1936.⁷ As from August 29, 1960, an occupier of land cannot (subject to certain exceptions) commence to use or permit the use of his land as a caravan site either without a site licence or in contravention of conditions contained in a site licence (s. 1 (1)). The "occupier" of land is not the individual caravanner but is the site operator (s. 1 (3)), who is however enabled to discipline his caravanners by terminating their licences or tenancies if they so act as to involve him in a breach of the conditions attached to his licence (s. 12 (1)). The licensing authority is the county borough council or county district council for the area in which the land is situated, and a licence can be issued only if the applicant is entitled to the benefit of a grant of permission to use the land as a caravan site under the

¹ Caravans as Homes, Cmnd. 872.

² Cmnd. 872, para. 330.

³ *Ibid.*, para. 161.

⁴ *Ibid.*, para. 213.

⁵ *Ibid.*, para. 189.

⁶ *Ibid.*, para. 43.

⁷ s. 269.

Town and Country Planning Act, 1947, otherwise than by way of development order (s. 3 (3)). If the applicant is so entitled then a licence can (and must) be refused only if the applicant has previously held a licence which has been revoked for persistent failure to comply with its conditions within the three years preceding the current application (s. 3 (6)). A licence may (and no doubt normally will) be issued subject to such conditions as the licensing authority "think it necessary or desirable to impose on the occupier of the land in the interests of persons dwelling thereon in caravans, or of any other class of persons, or of the public at large" (s. 5 (1)). This wide general power is reinforced by a list of particular matters with reference to which conditions may be imposed. The only expressed limitations on the authority's power are that conditions cannot define the type of caravan to be allowed on the site by reference to the materials used in its construction, and that regard must be had to the model standards published by the Minister⁸ (s. 5 (2) and (6)). A "person aggrieved"⁹ by a condition may appeal to the local justices who may vary or cancel the condition if (after having had regard to the prescribed model standards) they consider that it is unduly burdensome (s. 7 (1)).

The new system of regulation has five advantages over the system which it has replaced. Firstly the deterrent has been increased from a maximum fine of £5 (and £2 a day for a continuing offence) to a maximum fine of £100, and, in the case of a second or subsequent offence, a fine of up to £250 (ss. 1 (2) and 9 (1)). Secondly the range of situations for which a licence is not required has been reduced. The First Schedule to the Act contains an apparently formidable list of cases where a site licence is not required,¹⁰ but none of them will have the same effect as did the exemption of sites which were not used for more than forty-two consecutive days or for more than sixty days in any twelve consecutive months.¹¹ This exemption often operated in practice so as to force the local authority to stand idly by whilst an unsuitable site was filled with caravans which could not afterwards be removed without emotional and sensational scenes.¹² The third advantage is that a licence may be conditioned by reference to matters which do not fall within the narrow rubric of the Public Health Act. The fourth advantage is the dependency of a licence on the existence of a planning consent. The fifth advantage is the attainment of

⁸ The standards specified under the Act by the Minister relate to: density and space between caravans; roads and footpaths; hard standings; fire fighting appliances; water supply; drainage, sanitation and washing facilities; refuse disposal; storage space; car parking, and recreation space.

⁹ From the context it would appear that this means the "occupier."

¹⁰ These cover persons ranging from itinerant caravanners to clerks of works who wish to live on their site.

¹¹ 1936 Act, s. 269 (2).

¹² The much abused general planning permission for the use of land as a caravan site for 28 days in any calendar year has also been abolished: Town and Country Planning General Development (Amendment No. 2) Order, 1960.

uniformity of conditions by observance of the Minister's model standards.

Existing caravan sites are brought within the new system of regulation by a somewhat complicated set of provisions. The expression "existing site" is defined as meaning both land which was used as a caravan site on August 29, 1960 (other than land which was first so used after the publication of the Bill for the present Act without an express grant of planning permission), and land which could have been lawfully used as a caravan site on that date without the need for any permission under the 1947 Act (s. 13). The occupiers of such sites were given until October 29, 1960, to apply for a licence (s. 14). The procedure upon such an application depended on whether or not at the time of the application the occupier was entitled to the benefit of an express planning permission with more than six months to run. If he was so entitled then a licence would be issued in the same way as if a new site was involved, but if he was not so entitled then the application had to be forwarded to the local planning authority who could either grant permission, serve an enforcement notice requiring the discontinuance of the use or (where the use was lawfully established but undesirably located) serve a discontinuance order (s. 17). Local planning authorities were therefore required to review the circumstances of all sites for which planning permission had either not been asked or was not necessary. In the case of established but undesirably located sites it may be expected that the authority will grant or will have granted permissions for limited periods sufficient to enable the existing residents to secure alternative accommodation elsewhere. In such an event the planning authority can issue a direction that a condition may be attached to the licence for the purpose of securing that the number of caravans on the site is progressively reduced (s. 20). The licensing authority cannot however impose such a condition unless they are satisfied that "suitable alternative accommodation" is or will be available for the persons displaced (s. 19 (2)). Parliament's insistence on this condition is tantamount to recognition that the majority of residential caravanners do not live in caravans as of choice but as of necessity. Residential caravanning will be a feature of society so long as the housing shortage persists.

CONTROL OF DEVELOPMENT

The alterations in the enforcement machinery of the 1947 Act which are made in Part II of the Act are too numerous to be explored individually in a note of this size. The reader's attention can be drawn only to the three more significant changes.

The most significant change is the abolition of the appeal to justices by a person aggrieved by an enforcement notice and the substitution of a right of appeal to the Minister. According to

one's viewpoint this may be regarded as either a retreat or an advance from the amateur judicial to the expert quasi-judicial. The grounds on which an appeal will lie are specified and correspond to those on which an appeal could be made to the justices¹³ together with three additional grounds, *viz.* that planning permission should be granted for the illicit development, that the development occurred more than four years before service of the notice,¹⁴ and that the period for compliance expressed in the notice is unreasonably short (s. 33 (1)). Presumably the Minister cannot (as could not the justices¹⁵) entertain an appeal against a notice which is *ex facie* a nullity. Since one cannot appeal against a nullity this is defensible in theory, but is there any practical reason why the Minister should not be able to rule on the validity of a notice? A person who receives a questionably valid notice will still have either to bring an action for a declaration or wait a criminal prosecution if he wishes to obtain a decision on validity. When he is competent to entertain an appeal the Minister is invested with comprehensive powers: he may quash or vary the notice, correct immaterial defects and errors therein, or grant permission for the retention or continuance of the development to which the notice relates. An appeal against the Minister's decision will lie to the High Court on a point of law, and he may of his own motion at any stage of the proceedings state a case for the decision of the court on any question of law (s. 34). Subject to an exception in favour of a person upon whom the notice was not served, an enforcement notice cannot in future be challenged in any proceedings if the ground of challenge is one which could have been asserted before the Minister (s. 33 (8)).¹⁶

The second significant change is the addition of a rule to the effect that compliance with an enforcement notice does not discharge it (s. 40). A not uncommon stratagem of illicit use changers was to cease the use for some months, thereby complying with the terms of the notice.¹⁷ Recommencement of the use would oblige the local planning authority to recommence enforcement proceedings *de novo*. This will no longer be necessary.

The third significant change is the creation of a new criminal offence and the increase of the penalties for existing offences. Under the 1947 Act an owner of land incurred no criminal liability through failing to remove a structure erected without planning

¹³ 1947 Act, s. 23 (4). The Minister is expressly given the power which the justices were held to have by implication, to inquire into whether what is assumed in the enforcement notice to be development does in truth constitute development for the purposes of the 1947 Act (see: *Eastbourne Corporation v. Fortes Ice Cream Parlour* [1959] 2 Q.B. 92 (C.A.)).

¹⁴ This is a power which the justices were held not to have in *Keats v. L.C.C.* (1954) 5 P. & C.R. 1 (D.C.).

¹⁵ See *Mead v. Chelmsford R.D.C.* [1953] 1 Q.B. 32 (D.C.).

¹⁶ This gives legislative effect to the discredited decision in *Perrins v. Perrins* [1951] 2 K.B. 414 (D.C.).

¹⁷ *Postill v. East Riding C.C.* [1956] 2 Q.B. 386 (D.C.); see also *Fyson v. Bucks C.C.* [1958] 1 W.L.R. 634 (D.C.).

consent, but he was liable to pay the local planning authority the cost of removal if they availed themselves of their right to enter on the land and take the steps required by the notice.¹⁸ The owner's criminal immunity in these circumstances has now been ended and in future he will be liable to a fine not exceeding £100 (s. 36). The initial penalty for failing to comply with an enforcement notice requiring the discontinuance of a use or the observance of conditions or limitations in a permission is increased from £50 to £100. The creation and increase might induce defaulters to take town and country planning a little more seriously.

MICHAEL MANN.

PAYMENT OF WAGES ACT, 1960

By the Truck Act, 1831,¹ employers have been obliged to pay those of their employees who are engaged in manual labour their entire wages in cash. The Payment of Wages Act, 1960, has now introduced several new permissible methods of payment—payment into a bank account in the employee's name, payment by postal order, by money order, by cheque, or payment partly in one of these ways and partly in another. The provisions relating to the first three of these new methods became effective on December 2, 1960, but the Minister of Labour must appoint a day on which the provisions relating to cheques will become operative.²

The power to pay in one of the new permitted ways is hedged around with numerous requirements designed to ensure that both the employer and the employee consent to the new method of payment. Failure to comply with any of these requirements results in the contract not being one permitted by the Act, and therefore it will fall foul of the Truck Act, 1831. In this event the agreement will be illegal, null and void,³ any payment not in accordance with the Truck Act will be illegal,⁴ the employee will be able to claim payment of his wages in cash⁵ and the employer may be unable to set off against this claim the amount already paid in the illegal manner. To create an agreement which will be effective under the statute the employed person must request his employer in writing to pay him in one of the permitted ways.⁶ There is no provision empowering the employer to ask the employee to accept payment in one of these new ways. Presumably, even if there is an agreement in writing for the payment of wages otherwise than in cash, it will be illegal unless the request has come from the employee. The employer must signify his acceptance either by paying in the

¹⁸ 1947 Act, s. 24 (1).

¹ And also by the Hosiery Manufacture (Wages) Act, 1874, and the Stannaries Act, 1887.

² Payment of Wages Act, 1960, s. 1 (3) and s. 7 (1).

³ Truck Act, 1831, s. 1.

⁴ *Ibid.*, s. 3.

⁵ *Ibid.*, s. 4.

⁶ Payment of Wages Act, s. 1 (1) and s. 1 (4).

requested way or in writing.⁷ He does not have to indicate his rejection of the request as the request lapses automatically after fourteen days.⁸

It is thus very unlikely that there could be a valid agreement to pay wages by a new method without the consent of both parties. But the stringent provisions which achieve this may well prevent the Act being widely used. The initiative is left in the hands of the employee, who is in all probability quite content with his cash payment. The employer may not insist on the inclusion of a term in the employment contract that the employee shall make a request as to the payment of his wages.⁹ So any employer willing to pay wages in one of the new methods must also cater for those employees who are content with the existing arrangements. It is therefore quite possible that an employer may find himself requested to run at least two different methods of payment. Both parties to the contract remain free to withdraw from these new arrangements¹⁰ and the employer may not require the employed person to refrain from cancelling his request.¹¹

Certain provisions are attached to the actual payment of the wages. Again failure to comply has the effect of removing the protection of the statute. The most important of these conditions is that at or before the time of payment the employee must be given a statement of particulars of deductions.¹² Incorrect statements will invalidate the payment unless the error is a clerical one or is made by accident, without negligence.¹³ If payment is to be by cheque then the cheque must be one payable to the employee or his order.¹⁴

The provisions of section 4 in relation to the payment of wages to absent employees are in direct contrast to the "contracting in" provisions above. The employer may pay the employee in one of the permitted ways unless the employee indicates in writing that he does not want the Act to apply.¹⁵ Section 4 is concerned with the payment of wages to an employed person who is absent from the usual place of employment due to illness or duties in connection with his employment. The employer may pay his wages in accordance with any request under section 1 of the Act or he may send the employee a postal order or a money order by post. A request to pay by cheque under section 1 does not imply a request to send wages by cheque under section 4—there must be a further request. Again particulars of deductions must be given. Section 4 came into operation when the Act was passed.

⁷ *Ibid.*, s. 1 (5).

⁸ *Ibid.*, s. 1 (6). This section also suggests that the employer might refuse in writing.

⁹ *Ibid.*, s. 6 (7).

¹⁰ s. 3.

¹¹ s. 6 (7).

¹² s. 2 (4) & (5) and Sched., Part I.

¹³ s. 2 (6).

¹⁴ s. 2 (2).

¹⁵ s. 4 (1) & (4).

The Act makes no attempt to deal with the problem of the Truck Acts, it merely alleviates some of the hardships which result from them. In particular the Act, if used, could, by avoiding the necessity of cash payments, reduce the number of bank and payroll robberies. However, there still remains the question whether the Acts are really necessary, or whether, now that the system of payment by truck has disappeared, it is more desirable to introduce a general statute relating to deductions from wages, which is not designed to give extra protection to one category of employees but applies to all.

It is still not possible to give an employee, who is covered by the Act, luncheon vouchers.

There is an interesting change in the name given to those persons covered by the Act—they are now known as “employed persons,”¹⁶ but the definition of “employed person” is the same as that of “artificer”¹⁷ so it is virtually restricted to “manual labourer.”¹⁸ To add yet another name having exactly the same meaning as the previous one hardly makes for clarity, especially as generally “employed persons” does not possess such a restricted meaning.

OLGA L. AIKIN.

¹⁶ s. 1.

¹⁷ s. 7 (1).

¹⁸ “Artificer” was changed by the Truck Act, 1887, to workman as defined in the Employers and Workmen’s Act, 1875, s. 10: “‘workman’ does not include a domestic or menial servant, but . . . means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . has entered into or worked under a contract with an employer . . . express or implied, oral or in writing. . . .”

REPORTS OF COMMITTEES

REPORT ON THE DEPARTMENTAL COMMITTEE ON HUMAN ARTIFICIAL INSEMINATION ¹

IN the evidence of the Marriage Law Reform Society to the Royal Commission on Marriage and Divorce,² the Society included a Chapter ³ on artificial insemination. It first mentioned artificial insemination by the husband (A.I.H.) but thought that no difficulty appeared to arise in connection with it. Difficulties might, however, arise over A.I.D. (artificial insemination of a wife by a donor who is not the husband). The most authoritative exposition of the law on A.I.D. then was the speech made by the President of the Divorce Division in the House of Lords on March 16, 1949, when he replied to the Archbishop of Canterbury who had suggested that A.I.D. ought to be made a criminal offence and said that it constituted adultery under the present law. The President disagreed. He considered that sexual intercourse was necessary to constitute adultery and A.I.D. was not adultery. The Society assumed, therefore, that no husband at present could obtain a divorce because his wife had been artificially inseminated otherwise than by him although he might be able to get a decree of nullity if the marriage had not been properly consummated. The Society pointed out that criminal offences, however, might be committed where a child was born through A.I.D. because this might lead to false statements in the register of births. Moreover difficulties of property might arise. The Society concluded that, in view of the steady increase in the practice of artificial insemination, some changes in the law were desirable, *viz.*, (1) where the consent of the husband is obtained, either to A.I.H. or A.I.D., he should for all purposes, such as registration, be legally deemed to be the father of the child and (2) there should be no possibility that the act if done with consent should be considered as adultery, but, when consent is not obtained, A.I.D. should be regarded as adultery and the husband be able to disclaim paternity.

A member of the Royal Commission, Sir Russell Brain, asked some questions about this evidence of the witnesses from the Society ⁴ and in particular he seemed to doubt if the number of cases of human artificial insemination was in fact increasing. He is now answered authoritatively by the Report of the Departmental Committee ⁵ who give some figures and ⁶ say that undoubtedly

¹ Cmd. 1105, H.M. Stationery Office, July 1960, price 5s. 6d.

² Paper No. 23, Evidence 9th day. H.M. Stationery Office 1953, price 6s.

³ No. 25.

⁴ Minutes of Evidence, p. 262, No. 1868 *et seq.* (June 10, 1952).

⁵ p. 7, para 23 of the Report.

⁶ Para. 22.

the practice now takes place on a larger scale than twenty years ago. Although the work and agitation of the Marriage Law Reform Society had been responsible for the appointment of the Royal Commission on Marriage and Divorce, the Commission did not like the Society's evidence and clearly avoided any direct reference to it, or to the Society, whenever it could. Nevertheless it gave some consideration to the recommendations on artificial insemination, and in paragraph 90 of the Commission's Report it recommended that the acceptance by a wife of artificial insemination by a donor without the consent of her husband should be made a new and separate ground of divorce.

The Departmental Committee was appointed in September 1958 because of an action in the Court of Session in Scotland where the wife alleged that the child born to her which appeared to be the result of an adulterous union was in fact conceived by artificial insemination by a donor. The Scottish court decided that artificial insemination in the form of A.I.D. did not constitute adultery and, after a debate in Parliament, the Committee was appointed. Their report endorses the recommendation of the Royal Commission that A.I.D. without the husband's consent should be a new ground of divorce⁷ and they further recommend that it should also be a ground for judicial separation. So long as parties are permitted to get an order of a court separating them without any right of remarriage it seems logical that this new ground should be a ground for a separation order. The Committee, therefore, go further than the Royal Commission and, since adultery is a ground for proceedings in a magistrates' court, they recommend that a husband should be able to take proceedings in a magistrates' court if his wife has received A.I.D. without his consent. This extension of the grounds for separation is logical and acceptable. The Committee also considered what should happen if the wife were given A.I.D. on the husband's initiative without her knowing what was being done and they concluded that it seemed unnecessary to give her a specific remedy since, and we may well agree with them, it is not likely that such a case would arise and, if it did, the wife could seek a divorce on the ground of cruelty.

The Departmental Committee then considered the question whether sterility should be a ground for nullity of marriage.⁸ Apparently this proposal was put to them as an alternative to A.I.D. They rejected this proposal on two grounds, the first being that it would be difficult to obtain satisfactory evidence of sterility. The Committee is not convincing on this point. They themselves point out that medical evidence cannot establish with certainty that, owing to impotence, a marriage is permanently incapable of consummation but a marriage can be annulled although doctors cannot say this with certainty. Divorce is granted for incurable

⁷ Paras. 116 and 117.

⁸ Paras. 137 to 139.

insanity although doctors cannot be certain that it will not become curable at some future time. The more fundamental objection to this proposal is said to be that it assumes that the procreation of children is the principal object of marriage and that, while it is no doubt an important object, says the Committee, it cannot be regarded in itself as the main object of marriage. It is difficult to see why this proposal involves this assumption and it would seem only to assume that the procreation of children is one of the principal objects of marriage and the Departmental Committee does actually recognise that the desire for children has a place in marriage! It is doubtful if a strong case can be put forward for this minor amendment of the law of nullity but at the same time it is desirable that both parties to a marriage should be very frank with each other before marriage and they should marry with the fullest possible knowledge of each other. The following alternative proposal of the Marriage Law Reform Society, which was not commented upon by the Royal Commission, might be a better amendment of the law than just to add one specific ground to those which permit a marriage to be annulled:

“While the Commission may not be authorised to recommend compulsory medical examination, we suggest that there should be laid down a general obligation to disclose all physical and mental defects or diseases suffered at any time. A questionnaire could be answered and supported by statutory declaration as part of the formalities of marriage. This principle alone would stiffen people’s consciences. But it would then be logical if, in addition to existing grounds, a decree of nullity could be given on the grounds of:

- (a) wilful concealment of any grave physical defect;
- (b) wilful concealment of insanity, mental deficiency or other grave mental defect or instability in the life of the party or in his or her immediate blood relations.”⁹

The Committee then recommend that, where a live child has been born to a woman, either as the result of A.I.H. or A.I.D. to which the parties to the marriage have consented, this should be a bar to proceedings by either spouse for nullity of marriage on the ground of impotence.¹⁰ This seems a sensible proposal. If it is resisted, it will be because nullity of marriage has assumed much too great an importance in the administration of the present matrimonial law. It has only assumed this importance because it sometimes offers an escape from an intolerable marriage which the divorce law, owing to its rigidity and artificial categories of matrimonial offences, does not give. If there were a sensible divorce law which permitted any marriage to be dissolved where it had in fact been established to the satisfaction of a court that the marriage had irretrievably broken down, then nullity of marriage would cease to be of any great importance.

⁹ Chapter 2, para. 8, of evidence to Royal Commission.

¹⁰ Paras. 108 and 156.

The Committee then all agree that a husband who has consented to his wife receiving A.I.D. should be required by law to maintain any child who may be born as a result ¹¹ but the next question was more controversial and two members of the Committee, Mrs. Peggy Jay and Mr. J. Ross, dissented vehemently from the recommendation that there should be no amendment of the laws relating to legitimacy or registration of births and that, where a child is born as a result of A.I.D. to which the husband has consented, it should remain illegitimate. The reasoning of the Committee on this point is most unconvincing ¹² and readers of the *Modern Law Review* are likely to view with sympathy the comments of the two dissenters. The four arguments against making such children legitimate are summarised in paragraph 171. The first is that, although the child would be relieved of the stigma of illegitimacy he would not be given complete security since he would still be liable to discover that he was probably not, biologically, the child of his supposed father. Why should this prevent him being given at least the legal security of legitimacy? Then it is said it would bring the child certain material advantages but might encroach seriously on the rights of other members of the husband's family and "interfere with the principle of hereditary succession which is the basis of our society." It is impossible to attach any sensible meaning to the statement that succession through blood descent "as such is at the basis of our society" (the Committee refer to the Monarchy and titles of honour) and, as for encroaching on the rights of other members of the husband's family, it should be said in reply that the child conceived by A.I.D. with consent is in fact a member of the family. The concept of the family is not these days rigidly confined to the biological children of both parents. It is interesting that the Committee does not mention section 1 (1) of the Matrimonial Proceedings (Children) Act, 1958, which extends the powers of the High Court concerning the custody and maintenance of children to a child of one party to the marriage who has been accepted as one of the family by the other party.

Then it is said that, to make A.I.D. children with consent legitimate would constitute a degree of official encouragement of A.I.D. and the consequent birth of children exposed to dangers to which children should not be exposed. It is not said what these dangers are and it is admitted that legitimation by subsequent marriage after an adulterous union is not an appreciable encouragement of extra-marital intercourse. Why the legitimation of children conceived by A.I.D. should, therefore, be held to officially encourage A.I.D. cannot be understood. Finally it is said that this proposal would involve an unprecedented change in the concept of legitimacy. But the fact that a change is unprecedented is not a reason for not making it. The simple question is—is a child conceived by A.I.D. with consent in effect a member of the family of

¹¹ Para. 157.

¹² Para. 187.

the father and the mother?—and there can be only one answer to this. It is as much a member of the family as a child which is legally adopted into the family. The Committee's arguments are about as weak as they could be and amount to little more than prejudice against A.I.D. If the Committee had really put the interests of children first then it is inconceivable that they could have come to this conclusion. Official words often say that, in actions which affect children, the interests of the children must come first but in practice this principle is not always applied. It is noteworthy that, according to the two dissenters,¹³ the Law Society representatives agreed that A.I.D. should not be made a criminal offence and accepted as a corollary that a child conceived by A.I.D. with consent should have full legitimacy because a community prepared to tolerate A.I.D. had a duty to protect the interests of the resultant children. The two dissenters recommend that the husband of a child conceived by A.I.D. with consent should, for the purposes of registration of births of such a child, be deemed to be the father of the child and the concept of legitimacy extended to cover a child born as a result of A.I.D. with consent.

A silly proposal considered by the Committee was that a wife should be allowed to take proceedings for divorce on the ground that her husband had given semen for the purpose of A.I.D. without obtaining her consent.¹⁴ It is really impossible to see why a wife should feel seriously injured in such circumstances and it would not often occur that a husband would behave in this way. If he did, it might well reflect some instability in the marriage. On this point we can agree with the Committee that the law should not be amended. As they say it would be difficult to prove whether semen was given for medical analysis or for A.I.D. If a marriage is unstable then let the general divorce law be changed to deal with it.

The Committee considered and rejected a proposal for a special register of children conceived by A.I.D. and it would seem that such a register would not be workable. No other recommendations are made by the Committee and we should perhaps be thankful that it concludes that, although the practice of A.I.D. is to be strongly discouraged, it should not be declared criminal or be regulated by law. The Committee's view about A.I.D. is that "it falls within the category of actions known to students of jurisprudence as 'liberties' which while not prohibited by law will receive no kind of support or encouragement from the law. It has long been the view of many people that there is a type of conduct which, although regarded by the community as a whole or a substantial part of it as immoral, ought not to be classed as criminal and therefore punishable by the state. The most common illustrations are fornication and adultery. This view was recently expressed in another connection by the Wolfenden Committee who

¹³ p. 85.

¹⁴ Para. 195.

wrote of 'a realm of private morality and immorality which is in brief and crude terms not the law's business.' " The Committee hope that their report will lead to the number of A.I.D. births diminishing. The problem is not a vast one since there do not appear to be more than 100 births per annum by A.I.D. at the moment but to invoke the criminal law against A.I.D. might lead to its underground practice. It is estimated that 50,000 illegal abortions take place every year and the deplorable consequences to the health of the women involved and the impossibility of preventing abortion have perhaps been a sufficient warning of the undesirability of making criminal actions which are not at least generally condemned. Even the two dissenters do not want to encourage A.I.D. but they say that, in stable marriages, it may be properly employed in small numbers of cases provided that both applicants and donors are carefully and expertly selected. The governing consideration should be the opportunity for happiness and security which the couple can offer a child conceived with the aid of a donor.

The few changes in the law which are proposed by the majority or the minority reports are not of urgent importance but it is to be borne in mind that, until the law is changed so that any child born to a married woman and accepted as one of the family by her husband is made legitimate, the status of a number of children will remain in doubt. If the practice of A.I.D. increases, and it would seem that it is very likely to, there are going to be a growing number of children born in this way. Such a child will apparently be as legitimate as children of the husband and no doubt the husband will have committed a criminal offence when he registered the child's birth. In theory its legitimacy can be challenged and, although it may in fact be very difficult to do this, it is not a good thing that a child's status should be in any doubt. Moreover, the law should not encourage the committing of criminal offences. Therefore this reform may become of increasing importance.

ROBERT S. W. POLLARD.

NOTES OF CASES

IRRESISTIBLE IMPULSE AND DIMINISHED RESPONSIBILITY

THE case of *R. v. Byrne*¹ is of interest not only because it further clarifies the meaning and scope of the defence of diminished responsibility, under section 2 of the Homicide Act, 1957,² but also because it demonstrates that the concept of mental abnormality under that section is much wider than M'Naughten insanity, and includes the notion of irresistible impulse, which has been for so long resisted in connection with the defence of insanity, and which resistance the Judicial Committee has so recently confirmed.³

This case was the appeal in what will probably be known as the Y.W.C.A. hostel murder case, where the accused had been convicted of murdering a girl whom he had strangled in a Birmingham hostel, and whose body he had mutilated. Three medical witnesses called by the defence, including the prison medical officer, were unanimously of the opinion that Byrne was a sexual psychopath and that he suffered from abnormality of mind, and, as the Court of Criminal Appeal observed, this was abundantly clear from the other evidence in the case. These medical witnesses considered that the abnormality of mind was such as to satisfy the conditions laid down in section 2 of the Homicide Act, 1957, *viz.*, that in this case it arose from a condition of arrested or retarded development of mind or inherent causes, and that this made it difficult or impossible for him to control his violent and perverted sexual desires. All three doctors were of the opinion that, although Byrne was not insane within the M'Naughten Rules, he was of diminished responsibility.

The appeal turned on the trial judge's direction to the jury on this matter. In effect, Stable J. had told the jury that a sexual psychopath, as defined by these doctors, could not claim a defence under the section. The fact that the accused found it difficult or impossible to control his violent sexual desires or impulses did not constitute such abnormality of mind as to substantially impair his mental responsibility for his acts. "In other words, mental affliction is one thing. The section is there to protect them. The section is not there to give protection where there is nothing else than what is vicious and depraved."

The Court of Criminal Appeal took no exception to this last phrase, but held that taken as a whole there was a misdirection

¹ [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1.

² For previous cases, see 21 M.L.R. 318 (May 1958); 21 M.L.R. 544 (September 1958); 23 M.L.R. 191 (March 1960).

³ *Att.-Gen. for S. Australia v. John Whelan Brown* [1960] 2 W.L.R. 588; 23 M.L.R. 545 (September 1960).

in the summing-up, and they substituted for the verdict of non-capital murder a verdict of manslaughter. The sentence of life imprisonment was not disturbed, that being "the only possible sentence having regard to the tendencies of the accused."

Lord Parker C.J. examines the law relating to the defence of diminished responsibility against the background of the law of murder, the M'Naughten Rules, and the rules relating to provocation. He shows how the common law dealt with loss of self-control, then demonstrates in a most lucid fashion that the approach under the Homicide Act, 1957, s. 2 (1), is much wider.

"Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naughten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.⁴

The court went on to consider the role of the jury and of the medical experts in relation to the evidence of abnormality of mind, repeating much the same ideas as had been previously expounded in *Matheson*⁵ and *Walden*.⁶ The jury are not bound to accept even the unanimous medical evidence if there is material before them which, in their judgment, conflicts with it and outweighs it. While the question of the aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) is a matter to be determined on the experts' evidence, the question whether the abnormality of mind, if it is proved, is such as substantially impaired the accused's mental responsibility for his acts in doing or being a party to the killing is a question of degree, and this is essentially a question for the jury.

Further, the question whether a person *could not* resist or control himself or *did not* resist his impulse is one which is not susceptible to scientific proof, and the jury can only approach the matter in a broad, common-sense way. The judge had misdirected the jury in telling them that difficulty or even inability to exercise will power to control one's physical acts could not amount to such

⁴ *Loc. cit.* pp. 443-444.

⁵ [1958] 1 W.L.R. 474.

⁶ [1959] 1 W.L.R. 1008.

abnormality as substantially impaired mental responsibility. This direction withdrew from the jury the essential determination of fact which it was their province to decide. Properly directed, the jury in this case could not have come to any other conclusion than that the defence of diminished responsibility was made out. Hence the verdict of manslaughter was substituted for the verdict of non-capital murder.

To those of us who have long complained about the narrowness of the approach under the M'Naughten Rules, this decision provides welcome evidence of the breadth of approach under the new provisions. There will no doubt be some who will shake their heads in despair, but this reviewer is not among them. Instead he regards the case as a natural and logical development, although it is perhaps a rather unexpected one and one which was certainly not foreseen at the time of the passing of the Act. His Australian colleagues will no doubt be extremely envious of the freedom which our jurisdiction enjoys under the new framework, which contrasts vividly with the limitations which they endure under the old common law rules, especially since the Judicial Committee has so recently rejected an ingenious attempt by the High Court of Australia to recognise irresistible impulse under the M'Naughten Rules through the back door, as it were.⁷ The remedy for them must now be legislation, along the lines perhaps of the Homicide Act, 1957, s. 2 (1).

J. E. HALL WILLIAMS.

THE SUCCESSFUL ATTEMPT

*Rogers v. Arnott*¹ is a remarkable case. D was tried summarily for attempted larceny. He had borrowed a tape recorder which he dishonestly offered to sell to P. On being offered the recorder, P disclosed that he was a police officer and arrested D. The magistrate dismissed the charge on the ground that the dishonest offer for sale constituted the completed offence of larceny as a bailee. The decision was affirmed on appeal to the Divisional Court.

The judgment of the court² was devoted entirely to the question whether the magistrate was right in holding that the facts amounted to larceny, and it was held that he was. There was no discussion of the consequence that D went free in spite of his commission of a criminal offence, unless the concluding paragraph of the judgment ranks as a discussion: "It is a little strange, perhaps, if the defendant should succeed on the grounds that he has committed the full offence and not merely attempted it, and it is said for him that in these circumstances he cannot be tried for the full offence. I

⁷ See note 3, *supra*.

¹ [1960] 3 W.L.R. 73; [1960] 2 All E.R. 417.

² Delivered by Donovan J., Lord Parker C.J. and Davies J. agreeing.

express no opinion upon that. The point is not raised in the case, and may yet arise for decision.”³

In 1953 Dr. Glanville Williams hopefully remarked that it “would be absurd if a man charged with an attempt could defend himself by proving that he succeeded.”⁴ The absurdity has come to pass in a refined form, for the defendant in *Rogers v. Arnott* must have regarded himself as having failed in that which he tried to accomplish, his only success being one attributed to him by the law itself for the purpose of setting him free. To characterise this extraordinary proceeding as “a little strange” is a noteworthy understatement. Not less remarkable is the assumption, both by the court and by counsel engaged in the case, that D was indeed entitled to be acquitted in the circumstances. One might have thought that on being confronted with a supposed rule of law which led to such a surprising and undesirable result, someone would have been moved to question it, if only for the purpose of drawing attention to the need for amending legislation. As it is, Mr. Arnott may count himself a lucky man, for it will be submitted herein that as the law stands he should have been convicted of attempted larceny notwithstanding the decision that his acts amounted to larceny; and furthermore, that he cannot now be tried for larceny.

Since nowhere in the report is it stated why D had to be acquitted once it was decided that he had committed larceny, one is left to assume that this part of the case rested on the old law of merger. At common law an attempt to commit an indictable offence is a misdemeanour,⁵ and a misdemeanour merges with a felony constituted by the same facts.⁶ The practical consequence of the merger is that the lesser offence disappears as a legal entity, so that D cannot be convicted of it. What the court in *Rogers v. Arnott* appears to have overlooked is that there is authority for the view that the doctrine of merger is no longer part of the law. This view is based on the interpretation of section 12 of the Criminal Procedure Act, 1851, adopted by the Court of Criminal Appeal in *Garland*.⁷ The section runs as follows:

“If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to

³ At p. 78.

⁴ *Criminal Law: The General Part*, pp. 503–504.

⁵ *Higgins* (1801) 2 East 5; *Roderick* (1837) 7 C. & P. 795; *Doody* (1854) 6 Cox 463; *Burgess* (1862) L. & C. 258. See also Williams, *op. cit.*, p. 471, note 1, and *Russell on Crime*, 11th ed., pp. 183–187.

⁶ 2 East P.C. 1031; *Harmwood's Case* (1787) 1 East P.C. 411; *Leddington* (1839) 9 C. & P. 79; *Nicholls* (1847) 2 Cox 182. But cf. *Neale* (1844) 1 Den. 36.

⁷ [1910] 1 K.B. 154.

discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour."

Dr. Williams⁸ appears to be the only commentator who thinks that this section abolished the doctrine of merger. Other writers have tended to the opposite opinion.⁹ No one seems to have taken into account the decision in *Garland*,⁷ which, it is submitted, concludes the question in favour of abolition. In that case P had intended to charge D with the statutory felony of receiving stolen goods,¹⁰ but owing to an omission in the indictment in fact charged him only with the common law misdemeanour of receiving. D was convicted at quarter sessions, in the words of the report, "on the indictment," preliminary objections to the form of the indictment having been overruled and the trial having "proceeded as in cases of felony." D appealed on the question whether the conviction was good. It was held that the indictment was "a good indictment for a common law misdemeanour" and that the conviction was "a good conviction for a common law misdemeanour," notwithstanding that the evidence proved the statutory felony of receiving. This decision could not have been reached if the misdemeanour had merged in the felony, and what is especially significant in the present context is that the court proceeded on the basis that the case came "directly within the language of section 12 of the Criminal Procedure Act, 1851."

The situation in *Rogers v. Arnott* was in principle exactly the same as in *Garland*. A statutory felony was proved on a trial for a common law misdemeanour of the same nature. There seems to be only one ground of distinction between the two cases, and that is that *Rogers v. Arnott* was a summary trial, whereas *Garland* was a trial by jury. If this distinction is relied on, the anomalous position is reached that the Criminal Procedure Act, or at least section 12 thereof, applies to trial by jury but not to summary trial; so that if D in *Rogers v. Arnott* had made the tactical error of electing to go for trial by jury¹¹ he would have been convicted. This is surely untenable. Admittedly there is no reported case in which the surviving sections of the Act¹² have been applied to summary proceedings, and each of those sections refers either to a jury or to an indictment. But, quite apart from the absurd consequences in cases like *Rogers v. Arnott*, there are other indications that the Act is of general application. Thus in section 30 the word "indictment" is defined as including "information." The laying of an information alleging an offence for which D has a right of election may lead just as well to summary trial as to trial by jury,

⁸ *Op. cit.* p. 503.

⁹ See for example *Russell on Crime*, 11th ed., pp. 208-209.

¹⁰ Larceny Act, 1861, s. 91. See now Larceny Act, 1916, s. 33.

¹¹ Magistrates' Courts Act, 1952, s. 25.

¹² ss. 9, 12, 18, 27, 28 and 30.

yet there is no law that before exercising his right to elect D must be made aware of the effect of the Criminal Procedure Act. If the Act does not apply to summary trial, one might have thought this to be a very material piece of information, especially since the failure to explain the right of election itself nullifies the proceedings.¹³ Moreover, section 28 of the Act simplifies a plea of *autrefois acquit* or *convict*. It would be strange if the result were that this plea could be made more easily on trial by jury than on summary trial, when the whole point of summary trial is to increase the efficiency of criminal procedure. It is submitted that the Criminal Procedure Act, 1851, applies, so far as appropriate, to summary trial as well as to trial by jury, and that accordingly D should not have been acquitted in *Rogers v. Arnott* on the basis of the old law of merger.

The next question is whether there is anything peculiar about attempts which would lead to an acquittal in circumstances which would otherwise call for a conviction. In other words, is it an essential element of attempt that the attempt should fail, so that proof of success is a good defence? There appears to be no case deciding the point. In the absence of authority it is submitted that there is nothing to be gained, and something by way of law enforcement to be lost, by introducing a requirement of failure into the law of attempts.

It is easy to see why this question has not yet been settled, for as long as the old law of merger applied, a practical case was not likely to arise. If a misdemeanour attempt merged into a completed felony, for all practical purposes attempt might well be defined in terms of failure. To test the issue it is best to take an example where either the attempt has been made a statutory felony or the completed offence is a statutory misdemeanour. Arson will do for the former and obtaining by false pretences for the latter. Suppose that D is charged with the statutory felony of attempted arson¹⁴ but succeeds in proving that he actually burnt a small part of the building he is charged with attempting to set fire to; or suppose that D is charged with attempting to obtain money by false pretences but succeeds in proving that he did in fact extract money from his victim.¹⁵ (This situation is not at all far-fetched. Many a victim of a confidence trick is reluctant to admit that he was sufficiently guileless to be taken in.) No question of merger can arise for in each case the attempt is of equal degree with the completed offence; but is it really the law that D is entitled to be acquitted of attempting because he was more dangerous than P knew, and succeeded in his attempt? Surely not.¹⁶

The last question is whether the defendant in *Rogers v. Arnott*

¹³ Magistrates' Courts Act, 1952, s. 25; *Stefani v. John* [1948] 1 K.B. 158; *Kent Justices* [1952] 2 Q.B. 355.

¹⁴ Malicious Damage Act, 1861, s. 8.

¹⁵ A misdemeanour: Larceny Act, 1916, s. 32.

¹⁶ To the same effect see *Russell on Crime*, 11th ed., pp. 206-208.

can now be tried for larceny, a point upon which the court expressly reserved its opinion. It is submitted that this matter also is settled by section 12 of the Criminal Procedure Act. The latter part of the section furnishes a procedure whereby in the circumstances of *Rogers v. Arnott* the trial may be stopped before verdict and a new trial for the completed felony ordered. But this procedure is not available where the first trial for the misdemeanour has gone to verdict. In the words of the section, "no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts."

A happy note on which to end is provided by the reflection that these complications can always be avoided if P takes the precaution of charging D with the completed offence, no matter how like an attempt the facts may look, for by section 9 of the Act a verdict of attempt may be returned if it appears "on the trial of any person charged with any felony or misdemeanor . . . that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same."

COLIN HOWARD.

COPIES OF COPIES

INTERESTING observations on a number of points of the law of documentary evidence were made by the Lord Chief Justice in delivering the judgment of the Court of Criminal Appeal in the recent case of *R. v. Collins*.¹

The appellant had been convicted of obtaining money by false pretences by cashing a cheque knowing that his bank account had been closed. In order to prove this knowledge the prosecution had called a bank manager to produce a copy of a carbon copy of a letter which had been sent by his co-manager to the appellant informing him of the Bank's decision to close his account, and counsel for the appellant raised a number of objections to this evidence.

The most significant of these objections depended upon his citation of *Archbold*² and the two cases of *Liebman v. Pooley*³ and *Everingham v. Roundell*⁴ for the proposition that a document cannot be proved by a copy of a copy. It is, indeed, possible to collect many more, for the most part old, authorities⁵ to the same effect as the cases given in *Archbold* but the majority of these cases are somewhat unhelpful since they merely contain brief passing

¹ (1960) 44 Cr.App.R. 170.

² *Criminal Procedure*, 34th ed., p. 483, para. 1282.

³ (1816) 1 Stark.N.P. 167.

⁴ (1838) 2 Moo. & Rob. 138.

⁵ *Faulconer's Trial* (1653) 5 How.St.Tr. 323, 349, 356; *Anon.* (1684) Skin. 174; *Smart v. Williams* (1694) Comb. 247, 248; *R. v. Haines* (1695) Comb. 337; *Dillon v. Crawly* (1701) Holt K.B. 299; *Tillard v. Shebeare* (1767) 2 Wils. 366; *Waldy v. Gray* (1875) 20 Eq. 238, 250; *McCullough v. Munn* [1908] 2 I.R. 194, 205.

statements of the proposition or at best found it on the best evidence rule. An exception to this is the Irish case of *McCullough v. Munn*⁶ where Fitzgibbon L.J. (in a dissenting judgment) cited *Taylor on Evidence*⁷ for the view that a copy of a copy would be rejected on the broad ground which renders hearsay inadmissible.

Professor Nokes in his *Introduction to Evidence*⁸ mentions the old rule and cites Gilbert, *Law of Evidence*⁹ for an explanation to the effect that when a copy of a copy is tendered there is "a chasm or gap in your evidence." Professor Nokes goes on to suggest that it should be possible to bridge the gap by showing that the first copy was examined with the original, and the second with the first, and that both copies are accurate, but no authority is cited for this. In *Collins* the Court of Criminal Appeal did not find it necessary to decide this point but the Lord Chief Justice did say¹⁰:

"as at present advised, they can see no objection to a copy of a copy being produced, provided that somebody is called who can verify not only that the copy produced is a true copy of the original copy, but also that it is in the same terms as the original."

thus giving strong support to the view that Gilbert's "chasm" can be bridged. The views of the Court of Criminal Appeal and of Professor Nokes are supported by *Wigmore on Evidence*¹¹ and by the Probate case of *Lafone v. Griffin*.¹²

The facts of this case were that upon the death of a testatrix probate of her will was not applied for since there were no assets. Her executor instructed his clerk to make a copying ink copy of the will from which several press copies were made and the first copy was then destroyed as it had been spoiled by contact with the gelatine plate. Some years later there was a fire in the executor's office and the safe and its contents, including the original will, were destroyed. Certain property having fallen into the testatrix's estate, it became necessary to propound her will. The executor swore that he could clearly recollect the original will and its contents and could speak with certainty as to the handwriting of the testatrix and one of the witnesses and could say that the signature of the other witness differed from the other handwriting on the document. Both the witnesses were dead. In these circumstances Bigham P. granted probate of a press copy.

In view of the strongly persuasive character of these judicial and academic opinions¹³ it seems that the old cases on the "copy

⁶ *Ante*, at p. 205.

⁷ 10th ed., para. 853.

⁸ 2nd ed., p. 387.

⁹ (1791-96) at p. 9.

¹⁰ (1960) 44 Cr.App.R. at p. 174.

¹¹ 3rd ed., Vol. IV, p. 556, para. 1274.

¹² (1909) 25 T.L.R. 308.

¹³ Roscoe, *Criminal Evidence*, 16th ed., p. 18; *Best on Evidence*, 12th ed., p. 406, note (q) and *Phipson on Evidence*, 9th ed., p. 566, also take the view that it should be possible to bridge the gap.

of a copy " rule should now be read subject to the possibility of the " chasm " being bridged. It must be remembered, however, that this involves the rejection of the ruling of Alderson B. in *Everingham v. Roundell*, for there the paper produced had been examined with a copy which had itself been compared with the original by the witness called to produce the second copy. This might seem a clear case of " bridging the gap " but Alderson B. said that to admit the second copy would open the door to all sorts of other evidence, however loose. The document produced, he declared, " was but a shadow of a shade " and could not be admitted.

If, as would seem both possible and desirable, the courts do allow the gap to be bridged it would also seem desirable that the courts should be fairly strict in their requirements in regard to " bridging " evidence. This in fact seems to have been the case in *Collins* for the " sub-copy " was there rejected because the bank manager producing it was ¹⁴

" quite unable to say, or at any rate did not say, that he had checked the document which he had produced with the carbon copy which was on the file and that what he was producing was a true copy of the original letter. That step in the proof was completely missing. . . ."

Doubtless the " copy of a copy " problem could not be circumvented in *Collins* by arguing that the carbon copy was a duplicate original ¹⁵ and thus the paper produced was a primary copy because, as is the normal practice, the carbon copy did not carry a reproduction of the signature on the top copy.

Counsel for the appellant in *Collins* also raised the point that the bank official actually called to produce the document, a co-manager of the author of the original letter, was not the proper witness to prove the copy. Here again the Court of Criminal Appeal did not find it necessary to express a final opinion but thought that there might well be circumstances in which it might be proper for a manager to produce a copy of a letter written by a co-manager. This opinion seems to be in accordance with the authorities on witnesses to examined copies and with Wigmore's view ¹⁶ that the witness to a copy need not himself be the transcriber or copyist if he has at some time compared the original and the alleged copy.

A. H. HUDSON.

¹⁴ (1960) 44 Cr.App.R. at p. 17.

¹⁵ On carbon copies as duplicate originals see *Wigmore*, 3rd ed., Vol. IV, p. 447, para. 1234; *Nokes, Introduction*, 2nd ed., p. 337; *Cross, Evidence*, p. 462.

¹⁶ 3rd ed., Vol. IV, para. 1280, p. 567. See also on witnesses to examined copies *Reid v. Margison* (1808) 1 Camp. 469, the *Crawford Peerage Case* (1848) 2 H.L.C. at p. 544 and other authorities collected in *Halsbury, Laws of England*, 3rd ed., Vol. 15, p. 364, and *Wigmore*, Vol. IV, paras. 1278-1279. *Contr*o *Cooper v. Marsden* (1793) 1 Esp. 1.

CONTRACT FRUSTRATED—THEN PERFORMED !

THE Suez incident continues to provide material for the illumination of the doctrine of frustration. In *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*¹ Pearson J. had to consider its effect upon a charterparty dated October 18, 1956,² by which the plaintiff's ship, the *Massalia*, was chartered to proceed "with all convenient speed" to Masulipatan³ and there load a cargo of iron ore to be carried "with all convenient speed" to Genoa. The *Massalia* arrived at Masulipatan on November 9, by which time the Suez Canal was blocked by over forty sunken ships. It was therefore, as the arbitrator found,⁴ likely to remain blocked for a period which would make it commercially impossible for the ship to await the reopening of the Canal. In these circumstances the shipowners contended that the contract was frustrated, while the charterers contended that the shipowners were bound to perform by taking the route via the Cape of Good Hope. The distance from Masulipatan to Genoa via the Cape was about twice that via the Suez Canal and the reasonable remuneration for the carriage of the cargo by this route would be 195s. per long ton, as opposed to the contract figure of 134s. per long ton.⁵ On the other hand the voyage via the Cape did not appreciably alter the capacity of the ship under the International Loadline Convention or expose the cargo to any risk of damage or deterioration and though this route would involve exposing the *Massalia* to maritime hazards for a longer period, the ship was capable of withstanding such hazards.⁶

In order to decide whether the charterparty was frustrated in such circumstances Pearson J. embarked on a thorough examination of the authorities, and in particular of the decision of the House of Lords in *Davis Contractors Ltd. v. Fareham U.D.C.*⁷ He held, first, that that case had not rendered a formulation of the doctrine in terms of an "implied term" incorrect and that any apparent difference between "implied term" and "construction" theories could be reconciled on the ground "that the court's decision to include in the contract, or exclude from it, an alleged implied term is part of the court's construction of the contract."⁸ It did not follow that the court should embark on ambitious speculations as to what the parties would have agreed since as Lord

¹ [1960] 3 W.L.R. 701; [1960] 2 All E.R. 529; [1960] 1 Lloyd's Rep. 594.

² That is, eleven days before the outbreak of hostilities between Israel and Egypt on October 29, 1956.

³ A port on the east coast of India, more usually spelt Masulipatam.

⁴ [1960] 3 W.L.R. at 705; [1960] 2 All E.R. at 533; [1960] 1 Lloyd's Rep. at 600.

⁵ [1960] 3 W.L.R. at 707; [1960] 2 All E.R. at 534; [1960] 1 Lloyd's Rep. at 603.

⁶ [1960] 3 W.L.R. at 706; [1960] 2 All E.R. at 534; [1960] 1 Lloyd's Rep. at 602.

⁷ [1956] A.C. 696; [1956] 2 All E.R. 145.

⁸ [1960] 3 W.L.R. at 709; [1960] 2 All E.R. at 536; [1960] 1 Lloyd's Rep. at 603.

Radcliffe had demonstrated⁹ this was often an unreal inquiry. Pearson J. concluded that "the essential comparison is not between the situation existing at the date of the contract and the situation existing at the time of performance, but between that which the shipowners by their charterparty contracted to do and that which, in the event, had to be done in order to carry the goods to Genoa."¹⁰

It may perhaps be suggested that even this formulation still leaves a vital question unanswered, *viz.*, was the contract one to carry goods from Masulipatan to Genoa via the Suez Canal or was it a contract to carry from Masulipatan to Genoa *simpliciter*? Such a question is often unanswerable in terms of the intention of the parties since they never distinguish between the two.¹¹ In this case however there was a finding by the arbitrator that both parties realised at the time of the contract that the development of the Suez crisis might lead to the Canal being closed.¹² It was therefore argued that the contract could not be frustrated by the closing of the Suez Canal since the parties had appreciated the possibility but had not provided for it. Pearson J. held however that though a number of judgments on frustration talk in terms of unforeseen events¹³ these words must be read in their context and were there used because the events which had there taken place had in fact been unforeseen. Accordingly he held that whether the event had been foreseen was merely one factor to be taken into account in determining whether the contract had been frustrated.¹⁴ This conclusion, while amply justified by the authorities, seems to indicate another situation where the implied term theory is unreal since the fact that the parties contemplated the alleged frustrating event and yet did not provide as to its effect might be thought to point strongly towards the imposition of an absolute obligation.

Pearson J. held however that the closure of the Suez Canal operated to frustrate the contract because "the proper view is that it was a term of the contract (whether express or implied) that the vessel was to go by the Suez route."¹⁵ At first sight this

⁹ [1956] A.C. at 728; [1956] 2 All E.R. at 160.

¹⁰ [1960] 3 W.L.R. at 712; [1960] 2 All E.R. at 538; [1960] 1 Lloyd's Rep. at 606.

¹¹ The same problem of course arises in cases of mistake. See the remarks of Devlin L.J. dissenting in *Ingram v. Little* [1960] 3 W.L.R. 523; [1960] 3 All E.R. at 346 D.

¹² [1960] 3 W.L.R. at 712; [1960] 2 All E.R. at 538; [1960] 1 Lloyd's Rep. at 606.

¹³ *e.g.*, per Lord Simon in *British Movietonews Ltd. v. London & District Cinemas Ltd.* [1952] A.C. at 185; [1951] 2 All E.R. at 625; per Lord Radcliffe in *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] A.C. at 731; [1956] 2 All E.R. at 161.

¹⁴ He relied on such cases as *Bank Line Ltd. v. A. Capel & Co.* [1919] A.C. 435 and *W. J. Tatem Ltd. v. Gamboa* [1939] 1 K.B. 132; [1938] 3 All E.R. 135 where the frustrating event was within the contemplation of the parties at the time of the contract. See also *McElroy on Impossibility of Performance*, at pp. 242-246 and *Carver on Carriage of Goods by Sea*, 10th ed., at p. 317.

¹⁵ [1960] 3 W.L.R. at 719; [1960] 2 All E.R. at 543; [1960] 1 Lloyd's Rep. at 610.

conclusion may appear surprising since in the other "Suez incident" cases a voyage from Port Sudan to various European ports via the Cape was held not to be "commercially different" from one via the Suez Canal.¹⁶ The mechanical application of these cases was, it is respectfully submitted, rightly resisted. Historically the doctrine of frustration was applied first to cases where performance of the contract had become physically and legally impossible but it is now clear that it can be invoked in circumstances where the contract can still be performed but changing circumstances have fundamentally altered the commercial nature of performance.¹⁷ The precise nature of the formulation of the doctrine as applied to the latter situation may still be a matter of dispute but however formulated the test cannot be mechanically applied. Whether a contract has become impossible of performance may be self-evident but whether there has been a fundamental change in circumstances must always be a question of judgment.¹⁸

Such a judgment turning, as it must, on a nice consideration of the contract and the changed circumstances cannot be readily applied to different circumstances. The previous Suez cases were themselves finely balanced, as witness the differing view taken by McNair J.,¹⁹ a judge with much experience in commercial matters, and it is reasonable to suppose that not much more was needed to tip the scales the other way. Pearson J. relied in particular upon two additional factors in the present case to support his conclusion that the contract had been frustrated.

The first of these was that clause 37 of the charterparty required the Captain to "telegraph to 'Maritsider Genoa' on passing Suez Canal." It is clear that this obligation could not be complied with if the ship did not pass the Suez Canal but it is equally clear that this in itself could not operate to frustrate the contract since the clause was one of comparatively minor importance.²⁰ Performance of this obligation would equally have been prevented by a break down in telegraphic communication between Suez and Genoa at the crucial moment but that would not frustrate the charterparty as a whole. The importance of clause 37 was rather that it carried with it an obligation to pass the Suez Canal.²¹ So it was possible to hold that the parties had not merely contemplated performance via the Suez Canal but had actually contracted on this basis.²²

¹⁶ *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.* [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160. Cf. *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.* [1959] 1 Q.B. 131; [1958] 3 All E.R. 115.

¹⁷ See Professor L. C. B. Gower in *Law and Opinion in England in the 20th Century*, at pp. 164-165.

¹⁸ But not it seems one of fact. See *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.* — ¹⁹ *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*

²⁰ [1960] 3 W.L.R. at 717; [1960] 2 All E.R. at 542; [1960] 1 Lloyd's Rep. at 608.

²¹ [1960] 3 W.L.R. at 717; [1960] 2 All E.R. at 542; [1960] 1 Lloyd's Rep. at 609.

²² [1960] 3 W.L.R. at 719; [1960] 2 All E.R. at 543; [1960] 1 Lloyd's Rep. at 610.

This conclusion was reinforced by the second factor, *viz.*, the nature of the contract. The earlier cases have been concerned with contracts for the sale of groundnuts c.i.f. various European ports. The present case involved a charterparty. The difference is important since the route is of more central importance in a charterparty than in a c.i.f. contract. The Court of Appeal had indeed suggested as much in *Tsakiroglou Ltd. v. Noble Thorl* where, in comparing the position before and after the closure of the Canal, Sellers L.J. said "what are the differences one may ask, from the point of view, *not of a shipowner who is required to send his ship on a different and greatly longer route, but of the parties to a c.i.f. contract.*"²³

It will be seen therefore that, though this was a question where opinions might easily differ, Pearson J. was able to derive considerable support for his view that the contract had been frustrated. This did not conclude the difficulties presented by the case however. Indeed the remaining problems were even more difficult. When the *Massalia* arrived at Masulipatan on November 9 both parties appreciated that the Canal was closed²⁴ but the shipowners nevertheless gave notice of readiness to load; the cargo was loaded by November 18 and the ship sailed from Masulipatan for Genoa on November 19. For reasons which do not clearly emerge²⁵ it was not until November 20 that the shipowners informed the charterers of their contention that the charterparty had been frustrated. Since the charterers contested this claim the voyage was in fact completed via the Cape. This state of affairs gave rise to a number of interesting contentions.

The charterers contended that the shipowners were estopped from pleading frustration because they had, by giving notice of readiness to load and permitting loading to take place, represented that the charterparty was not frustrated.²⁶ Pearson J. held however that there was no representation of fact such as would found an estoppel at common law and that "there has been no development of this comparatively new doctrine of equitable estoppel which is wide enough to cover the present case."²⁷ This view seems amply justified since, even on the widest view of the "*High Trees*" doctrine, a *sine qua non* of its application is an unequivocal representation of intention²⁸ and the conduct of the shipowners here, though perhaps surprising, was hardly unequivocal.

Pearson J. also rejected a contention that a new contract had come into existence by which the cargo was to be carried via the

²³ [1960] 2 W.L.R. at 876; [1960] 2 All E.R. at 165. Italics supplied.

²⁴ *Supra*, note 4.

²⁵ No findings were made but it was suggested that the shipowners might have had to take advice on English law.

²⁶ [1960] 3 W.L.R. at 721; [1960] 2 All E.R. at 545; [1960] 1 Lloyd's Rep. at 611.

²⁷ [1960] 3 W.L.R. at 722; [1960] 2 All E.R. at 546; [1960] 1 Lloyd's Rep. at 612.

²⁸ See, e.g., *Foot Clinics (1943) v. Cooper's Gowns* [1947] K.B. 506.

Cape at the same rate of freight as in the original charterparty. Such a contract would have to be inferred from the acts of the parties but these were equally consistent with a belief that the original charterparty was in force or with a determination to maintain the *status quo* pending the determination of the legal position.²⁹ This finding however left unanswered the question whether the shipowners were entitled to remuneration for actually carrying the cargo and if so on what basis. Pearson J. held that they were entitled to sue on a *quantum meruit* and to recover a reasonable remuneration, i.e., "195s. per long ton delivered."³⁰

It may perhaps be thought that there is a concealed inconsistency between the last two rulings of Pearson J. but it appears that this case is an illustration of the twofold nature of a *quantum meruit*, which may be based either upon a genuine "implied-in-fact" contract or in quasi-contract.³¹ This dual character is generally held to be illustrated by the case of *Craven-Ellis v. Canons Ltd.*,³² upon which Pearson J. relied.³³ In that case the plaintiff had acted as managing director of a company under a contract, which was in fact void since neither the plaintiff nor the directors who had purported to act on behalf of the company had ever acquired the requisite qualification shares. It was nevertheless held by the Court of Appeal that the plaintiff was entitled to recover reasonable remuneration for the services rendered to the company on a *quantum meruit* and Greer L.J. observed³⁴ "the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods."

As Lord Denning has pointed out, however,³⁵ it is possible to read too much into this case. It certainly does not stand for the proposition that wherever A renders services for B without a contract, he can recover reasonable remuneration on a *quantum meruit*. An additional factor is needed which was there provided by the "company's acceptance" of the plaintiff's services.³⁶ It is submitted that "acceptance" in this context must involve the possibility of refusal³⁷ and not merely the receipt of the benefit of the plaintiff's labours. This will usually mean either a request by the defendant or at least a conscious acquiescence in the plaintiff's conduct. It was possible to find this in *Craven-Ellis v. Canons Ltd.* since although the directors had not the authority to accept the

²⁹ [1960] 3 W.L.R. at 723; [1960] 2 All E.R. at 546; [1960] 1 Lloyd's Rep. at 613.

³⁰ *Supra*, note 5.

³¹ *Cheshire and Fifoot on Contract*, 5th ed., at p. 549. ¶

³² [1936] 2 K.B. 403.

³³ See also *Hain Steamships Ltd. v. Tate & Lyle Ltd.* [1936] 2 All E.R. 597; (1936) 55 Ll.L.R. 159.

³⁴ [1936] 2 K.B. at 412.

³⁵ 55 L.Q.R. 54.

³⁶ See *per* Greer L.J. at [1936] 2 K.B. at 412.

³⁷ See, e.g., *Forman & Co. v. Ship "Liddesdale"* [1900] A.C. 190.

plaintiff's services there were only two shareholders and their consent was easily inferred. In effect therefore all the essentials of an "implied-in-fact" contract existed except that the parties thought they were acting under an express contract.

Can this principle be applied to the facts of the instant case? It would seem that the fact that the contract, instead of being void *ab initio*, was avoided by a frustrating event is not material but it is material to note that whereas in *Craven-Ellis v. Canons Ltd.* the parties both assumed the contract to be valid, in the present case the question whether the contract had been frustrated was the subject of hot debate from November 20 onwards. Pearson J. seems to have assumed that this made no difference. He said³⁸ "there was no breach of contract or other wrongful act by the shipowners. They carried the goods from Masulipatan to Genoa for the charterers' benefit and with the consent of the charterers. In my view the law implies or imposes an obligation for the charterers to pay reasonable freight."

This is not an obviously unreasonable conclusion although it may perhaps be thought a little hard on the charterers in that the shipowners placed them in a difficult position by not raising the issue of frustration until after the voyage had begun. It does seem however to extend this head of *quantum meruit* somewhat, since most of the books rest it upon a belief by the plaintiff in the existence of a valid contract. Thus Anson expresses the principle as follows³⁹: "where work is done or services rendered in pursuance of an agreement which is supposed to be, but is not, a binding contract, an obligation to pay for the work or the services rendered is imposed by the law." A similar formulation is adopted by Cheshire and Fifoot.⁴⁰ It is clear however that at least during far the greater part of performance, the shipowners did not suppose themselves to be bound to perform. It is interesting to speculate as to what the charterers should have done in order to avoid having to pay at the increased rate.⁴¹

M. P. FURMSTON.

QUALIFIED PRIVILEGE

*Webb v. Times Publishing Co. Ltd.*¹ is an important case on the scope and basis of the defence of qualified privilege in defamation.

The case arose out of the publication by *The Times* of a report of the proceedings of a Swiss court in which Hume, a British

³⁸ [1960] 3 W.L.R. at 725; [1960] 2 All E.R. at 548; [1960] 1 Lloyd's Rep. at 614.

³⁹ *Contract*, 21st ed., at p. 561.

⁴⁰ *Contract*, 5th ed., at p. 551. See also Wilson, *Principles of Contract*, 1st ed., at p. 499.

⁴¹ One answer hinted at by Pearson J. would have been to direct the shipowners to unload at Colombo. Would the charterers then have been bound to pay freight from Masulipatan to Colombo?

¹ [1960] 3 W.L.R. 352; [1960] 2 All E.R. 789.

subject of the United Kingdom, was tried for murder, attempted murder and robbery in Switzerland. Some years earlier Hume had been tried by an English court for the murder of one Setty. He was found not guilty of murdering Setty, but was convicted of being an accessory after the fact and sentenced to imprisonment. After his release and before the Swiss trial he was wanted by the English police on charges of attempted murder and armed robbery in England. In the course of the Swiss trial, Hume, in response to the judge's interrogation, admitted to having committed the crimes for which he was wanted by the English police and also said that he had in fact killed Setty, out of jealousy. Asked if he was married and had a child, Hume replied: "Yes, but it was not mine. The father was Stanley Setty." This reply was included in *The Times* report of the trial.

The plaintiff in an action for libel against *The Times* was the wife of Hume at the time of his trial for the murder of Setty. In evidence at that trial she had sworn that she had never met Setty in her life, and she alleged that the words published by *The Times* meant that she had committed adultery with Setty and had given perjured evidence at Hume's trial. The case came before Pearson J. for the determination of the preliminary point of law whether the defendants' claim that the report was privileged disclosed any defence in law. In view of the freedom with which the English Press has often reported foreign trials, it is surprising that there was no authority on the question.

Two contentions were put forward by the defendants to justify the privilege they claimed. The first and broader one, of more general interest to newspapers, was that the report was privileged on the ground simply that it was a fair and accurate and contemporaneous report of judicial proceedings publicly heard before a court of competent jurisdiction. Beyond conceding that this would not necessarily cover the courts of every foreign country, and might be limited to courts in Western European countries, they were thus claiming the same protection for reports of foreign judicial proceedings as that which exists at common law for reports of judicial proceedings in this country.

Pearson J. rejected this broad claim. From an analysis of the cases he found that five reasons had been put forward to justify the privilege which attached to reports of judicial proceedings, *viz.* (1) that the courts are open to the public and what takes place in court is therefore necessarily and legitimately made public; (2) that the administration of justice is a matter of legitimate public concern and only by means of Press reports is the general public able to form a judgment on it; (3) that it is of benefit to the public that people should learn about the administration of the law under which they live; (4) that those affected by what is said in court may be better off with fair and accurate reports than with rumours circulating; (5) that the general advantage in having the

proceedings made public more than counterbalances the detriment suffered by people incidentally defamed. Pearson J. pointed out that each of these reasons loses most, if not all, of its force when applied to reports of foreign judicial proceedings. "As regards English proceedings, it is desirable to have a simple rule, and it is not unreasonable to say that all persons living in England have a real interest in, and are concerned with, anything that happens in any part of the country in the administration of the law in any of their courts. But it would be extravagant to say that the citizens of England have a real interest in, and are concerned with, the adjudication of some trivial and purely personal dispute in some minor court on the other side of the world." Nor did he think it practicable to limit the privilege claimed to the courts of Western Europe or to some other category of courts which satisfied minimum standards of justice. Apart from other difficulties, it would not, he thought, be in accordance with international comity for our courts to decide whether or not a foreign trial is genuine or properly conducted.

Having rejected the defendants' broad contention, Pearson J. then had to consider their narrower contention that the report published by them was privileged in the special circumstances of the case. Here the defendants were more successful. Though there was no authority directly in point, an historical examination of the cases established, he held, that "originally and in principle there are not many different kinds of privilege, but rather for all privilege there is the same foundation of the public interest." Upon this broad principle, he thought that if it was in the public interest that some foreign judicial proceedings should be reported in the English Press, then the report would be privileged.

The case which lent most support to this view was *Perera v. Peiris*,² where it was held, on appeal from Ceylon, that the publication in a newspaper of an extract from the official report of a Commission appointed to inquire into allegations of bribery on the part of certain members of the Ceylon State Council, was privileged on the broad ground that the public interest was served by publication. It was said there that whereas in the case of judicial and parliamentary proceedings the nature of their activities conclusively establishes that the public interest is served by reports of their proceedings, in the case of other bodies the status of the body is not in itself conclusive, but regard must be had to the subject-matter of the particular report. Applying this reasoning to the case before him, Pearson J. held that a fair and accurate report of foreign judicial proceedings satisfied the requirement of "status" and that the subject-matter of the report was of legitimate and proper interest to the English public because of its connection with the administration of justice in England. The particular words complained of were not unrelated to this legitimate interest, since

² [1949] A.C. 1.

they supplied an explanation of the motive for which Hume, according to his confession, had killed Setty.

The judgment of Pearson J. is certainly not lacking in judicial valour, and it is pleasant to read a judgment in a case of first impression founded so openly on general considerations of public advantage. Opinions on the merits of this extension of privilege at common law are likely, however, to be divided. Though it is undoubtedly true, as he said, that the broad foundation of all privilege (and fair comment) is the public interest, this has not generally been interpreted by the judges to mean that a person supplying information of legitimate concern to others is, on that account alone, entitled to protection. A purveyor of information has ordinarily been required to show further that he was under a legal, moral or social duty to communicate the information or shared a legitimate common interest in the subject-matter of it with those to whom he communicates it. The only two exceptions to this further requirement so far recognised by the courts are reports of parliamentary and judicial proceedings, where the nature of the proceedings reported has been held in itself to establish that the public interest is served by publicity. Reports of public meetings are not privileged at common law. The effect of this requirement of duty or common interest has been to keep the scope of privilege within reasonable bounds and to provide a sensible criterion of whether the public interest is really served by protecting an honest communication. Though public interest has been the ultimate criterion, it is fair to say that the predominant approach has been to ask whether inconvenience would be caused by denying protection to a communication, rather than whether a legitimate interest is served by publication.

It is therefore a little disturbing to find an extension of qualified privilege justified on the broad ground of legitimate public interest. *Perera v. Peiris*, on which Pearson J. placed most reliance, was an appeal from Ceylon, turning on Roman-Dutch law; though English cases were referred to, the Judicial Committee did not purport to be stating English law. Nor do the other two cases cited by Pearson J. lend much support to such a broad rule. In *Cox v. Feeney*,³ it is true that a newspaper account of a report by an inspector of charities under the Charitable Trusts Act was held to be privileged as being of public interest; but the dictum of Tenterden C.J. applied in that case, that "a man has a right to publish, for the purpose of giving the public information, that which it is fit and proper for the public to know," has been held to be too wide.⁴ And the decision of the Court of Appeal in *Allbutt v. General Council of Medical Education and Registration*⁵ that a report of its proceedings issued by the Council was privileged, was based, not merely on the

³ (1863) 4 F. & F. 13.

⁴ See Buckley L.J. in *Adam v. Ward* (1916) 31 T.L.R. at 304.

⁵ (1889) 23 Q.B.D. 400.

ground that it was of legitimate interest to the public, but also on a finding that the Council was under a duty to inform the public of the grounds for its decisions.

It is thought that Pearson J. attached undue importance, in *Webb's* case, to the question whether the subject-matter of the report was of legitimate interest to the English public. Had Hume made his confession in a book or article, explaining his motive in the same way, this would equally have concerned the administration of justice in this country; yet it is clear that this interest alone would not afford any protection to a person who published it. Why should the fact that the statement is made in the course of foreign judicial proceedings alter the position? Pearson J. himself held that the general public interest in foreign trials does not warrant any general rule of privilege. It can hardly be said that the circumstance in *Webb's* case that Hume made the statement in the course of a trial provided any special guarantee of truth.

The scope of qualified privilege for fair and accurate newspaper reports has, of course, been greatly extended by statute, and the Defamation Act, 1952, following the recommendations of the Porter Committee, now gives protection to reports of the proceedings of Commonwealth and international courts. The Porter Committee, though inclined to the view that reports of the proceedings of some foreign courts should also enjoy qualified privilege, thought it impossible to put forward any criterion of general application which would limit it to courts which maintain a standard of justice and observe a procedure which would justify protection.⁶ It seems to have been assumed by the Committee that there would be no privilege at common law. It is, of course, not easy to justify an arbitrary distinction in this matter between Commonwealth and foreign courts, and some may think that a limited extension of privilege to reports of foreign proceedings, such as Pearson J. favoured, is therefore to be commended. But a statute which amends the common law is not always a proper basis for analogical reasoning. The example of trade union immunities springs to mind. If a statute marks out, sometimes in an arbitrary way, the limits of an exception to a common law rule founded on good sense, it is no function of the courts to extend the common law by analogy to the statute.

In *Webb's* case the report was held to be privileged because of its connection with the administration of justice in England. Pearson J. envisaged other cases where a report would similarly be privileged because of some "special connection with English affairs." One imagines that the trials following the Drummond murders in France some years ago would have satisfied this requirement. Sometimes, he thought, a report of foreign judicial proceedings will have such intrinsic world-wide importance that it would be privileged without any special English connection. (The

⁶ (1948) Cmd. 7536.

Eichmann case?) Indeed, if we accept the general reasoning on which the decision is based, privilege can hardly be confined to reports of judicial proceedings alone. The notion of "status" which Pearson J. adopted from *Perera v. Peiris* is apt to cover many other public bodies. He even went so far as to ask rhetorically whether there could be a plea of "fair information on a matter of public interest" co-ordinate with the plea of "fair comment on a matter of public interest." The Press would certainly welcome such a plea. But it can hardly be said that *Webb's* case has established it, though it leads in that direction.

DOUGLAS PAYNE.

POLYGAMOUS MARRIAGES AGAIN

*Sowa v. Sowa*¹ exemplifies again the injustice wrought by the rule that English courts cannot give any matrimonial relief in respect of marriages which at their inception are potentially polygamous even if they remain actually monogamous.² The parties were educated persons domiciled at all material times in Ghana; the appellant was visiting that country in September 1955, when he became engaged to the respondent, who was a teacher. In October 1955 the appellant resumed his residence in England. In November 1955 a proxy marriage was celebrated in Ghana; this was shown by expert evidence to be a valid, though potentially polygamous, marriage according to the customs of the tribe of Ga, to which the parties belonged. At the time of the engagement, however, the appellant had given the respondent a ring and a Bible. Expert evidence showed the significance of this in tribal law to be that the appellant promised to convert the potentially polygamous marriage into a monogamous marriage—either in church or before a registrar.³ In January 1956 the respondent joined the appellant in England and began to live with him as man and wife without insisting on performance of any "conversion ceremony." The appellant persistently refused to implement his promise when pressed to do so. Eventually, in January 1960, the respondent obtained an order (on the ground of desertion) from the Liverpool stipendiary magistrate awarding to her maintenance for herself and the child of the union and custody of the child under the Summary

¹ [1960] 3 All E.R. 196 (Div.Ct.); [1960] 3 W.L.R. 733.

² *Hyde v. Hyde & Woodmansee* (1866) L.R. 1 P. & D. 130; *Risk v. Risk* [1951] P. 50. Cf. *Baindail v. Baindail* [1946] P. 122 (C.A.) approving *Srini Vasan v. Srini Vasan* [1946] P. 67. These decide simply that if a man domiciled in a country permitting polygamy there contracts a valid polygamous marriage, he has the status of a married man according to his domiciliary law and cannot subsequently contract a valid marriage in England during the subsistence of the prior marriage. For a case where the marriage was at its inception monogamous but could have later become polygamous (which never happened) and relief was granted, see *Mehtha v. Mehtha* [1945] 2 All E.R. 690.

³ See also s. 44 of the Marriage Ordinance of 1884 (c. 127 of the Laws of the Gold Coast, 1951, revised).

Jurisdiction (Separation and Maintenance) Acts. The appellant appealed against this order: the magistrate had proceeded on the footing that the marriage was valid and it apparently had not been argued before him that the marriage was caught by the rule in *Hyde v. Hyde*⁴ and therefore could not give rise to the "remedies, the adjudication, or the relief of the matrimonial law of England."⁵

Their lordships unanimously, though with great reluctance,⁶ allowed the appeal. It was considered that both the *Srini Vasan*⁷ and *Baindail*⁸ cases were beside the present point and that the decisions in *Hyde*⁹ and *Risk*¹⁰ clearly stood in the respondent's way. Lord Merriman P. examined at length the wording of the sections of the Acts on which the respondent had relied and concluded that they were provisions made in favour of a monogamously married woman against her husband and in respect of people who could be described as children of the marriage.¹¹ Marshall J. regretfully rejected an argument to the effect that it was possible for the court to regard as a married woman for the purposes of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, any woman married in a valid sense, whether monogamously or polygamously, even though it was not possible for the purpose of obtaining relief in the High Court.¹² In giving leave to appeal to the Court of Appeal the learned President remarked: "if the same law did not apply in matrimonial issues in magistrates' courts as applied in the High Court we should arrive at the absurd position that in a cruelty case a petition could be brought for divorce, and in a desertion case after three years a petition could be brought for divorce on the ground of desertion supported by magistrates' court orders made in the jurisdiction which would be peculiar to them, though denied to the Divorce Court."¹³

⁴ *Supra*.

⁵ (1866) L.R. 1 P. & D. 130, at p. 138, *per* Lord Penzance.

⁶ In an earlier attempt to get some money from the appellant, the respondent had brought affiliation proceedings against him and he had put up the defence that the appellant was validly married to him according to tribal custom. The magistrates thereupon adjourned the case. Their lordships not unnaturally felt that it was most unmeritorious for the appellant now to get off scot-free by putting up the *voite-face* defence that he was not married to the respondent at all.

⁷ *Supra*.

⁸ *Supra*.

⁹ *Supra*.

¹⁰ *Supra*. Suppose similar facts arose today and the wife petitioner sought a maintenance or custody order in respect of a child of the potentially polygamous marriage under s. 3 of the Matrimonial Proceedings (Children) Act, 1958. One would like to think the court would provide for such a child, but it would doubtless hold that being "an attempt to obtain direct matrimonial relief in respect of a marriage which is potentially polygamous" it must still fail.

¹¹ [1960] 3 All E.R. at pp. 200-201. See, however, s. 16 (1) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, for a definition of the wider class of children over whom the courts are to have jurisdiction.

¹² [1960] 3 All E.R. at p. 204.

¹³ *Ibid*.

In the present state of the law it is impossible to see what other conclusion their lordships might have reached. It is interesting to speculate on what would have been the prospects of success had the respondent sued the appellant for breach of promise to go through the "conversion ceremony." It is clear that the respondent went through the proxy ceremony believing that the appellant would implement his promise; he was at no material time married to another woman and there appear to be no difficulties surrounding the corroborative evidence which would be required.¹⁴ Given that the contract was by its proper law more than a mere contract to go through a ceremony of monogamous marriage together but was an agreement to become one another's spouses in the *monogamous* sense, that is to say, to become in the English sense, husband and wife with all that that should entail,¹⁵ it is difficult to see why the respondent should be prevented from recovering substantial damages because she already possessed the status of wife of the respondent according to their domiciliary law. But for the fact that the respondent must have known that she had entered into a marriage of a polygamous character and had been unwise enough to live in England with the appellant as man and wife before insisting on the "conversion ceremony," one might be tempted to suggest that the husband's unmeritorious conduct justified an award of exemplary or vindictive damages against him.

The case reveals how desirable would be legislation to permit the courts to give relief where the marriage is actually monogamous although potentially polygamous.¹⁶ It shows, too, how very fortunate was the petitioner in *Ohochuku v. Ohochuku*¹⁷ to have gone through a form of marriage in England.

P. R. H. WEBB.

PRIVACY AND THE PRESS

How far does the law protect an individual's privacy? The question of privacy is discussed frequently in public, but is rarely raised directly in the courts. However, the problem has been raised indirectly in the recent Court of Appeal decision *Williams v. Settle*.¹

The defendant was a professional photographer and was engaged by the plaintiff to take photographs at his wedding. This was done satisfactorily. Two years later, when the plaintiff's wife was expecting the birth of a child, her father was found murdered, and

¹⁴ By s. 2 of the Evidence Further Amendment Act, 1869.

¹⁵ See *Kremezi v. Ridgway* [1949] 1 All E.R. 662 at p. 664, *per* Hilbery J. It is assumed that the proper law would give a right of action for the breach.

¹⁶ Cf. Family Allowances and National Insurance Act, 1956, s. 3.

¹⁷ [1960] 1 All E.R. 253; Webb (1960) 23 M.L.R. 327; Griew (1960) 9 I.C.L.Q. 503.

¹ [1960] 1 W.L.R. 1072; [1960] 2 All E.R. 806 (C.A.).

the matter attracted much publicity. Representatives of two national newspapers swooped down upon the photographer and persuaded him to sell, without authority, certain photographs of the wedding group to them. One such photograph was published prominently in the two newspapers a few days after the plaintiff's child was born.

The plaintiff obtained an apology from the Press Council, £52 10s. damages and costs from the *Daily Express* and an apology and undertakings from the *Daily Mail*, and he also brought an action against the photographer for infringement of his copyright in the photographs. The photographer eventually admitted that the copyright in the photographs was in the plaintiff and the county court judge awarded him £1,000 damages including a sum of vindictive or punitive damages because of the scandalous behaviour of the defendant. The Copyright Act, 1956, specifically provides that punitive damages may be awarded where the circumstances so justify.² Upholding the award of punitive damages, the Court of Appeal emphasised that this might act as a warning to those who were prepared to invade the confines of one's privacy. Thus Sellers L.J. stated: "... one matter, among others, justifying heavy damages is that they may well hold the defendant up as an example to the community, that is to say, that they may act as a deterrent to others who are willing to supply to the Press information which they know is going to be used in a manner which will be so hurtful and distressing to the people involved."³

One of the matters objected to by the defendant was that the judge, in awarding damages, wrongly took into consideration the suffering of the plaintiff's family, and in particular the terrible shock to the plaintiff's wife coinciding, as the publication did, with her own confinement. The Court of Appeal was unable to accept this argument and stated that the suffering to the wife was part of the damage suffered by the husband: "... there is no reason why the distress caused to the wife should not be regarded as part of the injury suffered by her husband. The mere fact that injury was caused to the wife was itself distressing and injurious . . . to the husband."⁴

This decision is to be welcomed, although the value of the case to those anxious to see the development of a legally protected right of privacy is limited. The method of awarding damages for injury to a number of interests provided that at least one legally protected interest is invaded is not unknown in English law. If a property right is infringed damages may be awarded not only for the immediate injury to the property right but also for the invasion of

² s. 17 (3).

³ [1960] 1 W.L.R. 1072, 1081. See also p. 1088, *per* Willmer L.J.

⁴ pp. 1086-1087, *per* Willmer L.J.

privacy which flows from the invasion of the protected right.⁵ Thus in this case the damages reflected an award not only for the infringement of copyright but also for the suffering to the plaintiff and his wife and possibly the family. However, if there is no invasion of a property right, or injury to reputation within the area of the tort of defamation, a separate action for invasion of privacy probably cannot be maintained.⁶ If this is the state of the law, then one can see why the Court of Appeal was prepared to award the husband damages for his wife's suffering. She could not have maintained any successful action, since she did not own the copyright in the photographs. But even the husband's remedy might easily be negated in the future. Ownership of copyright in photographs may be based upon agreement,⁷ and it is a simple matter for photographers to have a short condition on the back of their agreement forms (if these are used) stating that the copyright shall vest in the photographer. Few members of the public, even if they read such a condition, would query it. If this were done, then on the facts of *Williams v. Settle* neither the wife nor the husband would have a remedy. But the behaviour, surely, is just as scandalous, and the invasion of privacy just as great.

In our modern society the insatiable curiosity of the mass media organisations, newspapers, magazines, radio, television and the cinema, is such that the ordinary citizen is ever aware of the possibility of unwanted, undesirable and damaging publicity. It is so easy for those seeking information to step over the bounds of discretion and decency and cause substantial damage to the individual. Organisations such as the Press Council, which attempt to control irresponsible behaviour, serve a useful purpose, but they are not always as effective as they might be. An apology is not usually as satisfactory as pecuniary recompense; nor is it as great a deterrent.

Surely it is time it was realised in this country that it is necessary for certain interests in privacy to be protected legally, and not confine this protection to parasitic damages arising out of defamation and damage to contract or property rights. The law must expand to meet new problems as was pointed out by Warren and Brandeis in their classic pioneer article: "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal

⁵ e.g., *Gee v. Pritchard* (1818) 2 Swan. 402; *Thurston v. Charles* (1905) 21 T.L.R. 659.

⁶ *Dochrell v. Dougall* (1899) 80 L.T. 556; *Sports and General Press Agency Ltd. v. "Our Dogs" Publishing Co. Ltd.* [1916] 2 K.B. 880, affirmed [1917] 2 K.B. 125 (C.A.); *Tolley v. Fry* [1930] 1 K.B. 467, 478, per Greer L.J.

⁷ Copyright Act, 1956, s. 4 (5).

youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property. . . . Gradually the scope of legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term ‘property’ has grown to comprise every form of possession—intangible as well as tangible.”⁸

Certainly it would be very difficult to attempt to delimit those interests in privacy which should be protected and those which should not, but this is no excuse for not dealing with the problem at all.⁹ The courts in many of the States in the U.S.A. have paid homage to the Warren and Brandeis article and have attempted to work out their own rules and standards to protect the right of privacy. In New York legislation was introduced as far back as 1903, and a large body of case law has developed since then.

The English courts, if they wish, could introduce quite boldly a legally protected right of privacy, for there has been little consideration of this problem in the higher courts.¹⁰ However, the judiciary usually prefers to introduce change through gradual extension of existing law. Even this is possible, by developing the tort of “wilfully doing an act calculated to cause physical harm” which lies dormant in the reports of *Wilkinson v. Downton*¹¹ and *Janvier v. Sweeney*,¹² and also by using the tort of negligence (which lies also for an intentional act).

Failing any positive development by the courts, it is possible to introduce legislation to define certain protected interests of the individual and lay down some standards upon which the courts could mould the law. This is a topic where a comprehensive research programme on the American progress in this matter would help the English Law Reform Committee if it were required—as it certainly should be—to deal with the problem.¹³ However the

⁸ “The Right to Privacy” (1890) 4 Harv.L.R. 193.

⁹ The literature on this topic in English legal periodicals is sparse. But see Winfield, “Privacy” (1931) 47 L.Q.R. 23, and two articles on the laws of Germany, Switzerland and France at pp. 203 and 219.

¹⁰ Cf. the attitude of Danckwerts J. in *Bollinger v. Costa Brava Wine Co. Ltd.* [1960] 1 Ch. 263, 283. “But the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another. There are such cases, of course, but they occur, as a rule, when the claims of freedom of action outweigh the interests of other persons who suffer from the use which a person makes of his own property.”

¹¹ [1897] 2 Q.B. 57.

¹² [1919] 2 K.B. 316 (C.A.).

¹³ There is an excellent summary of the American cases by Dean Prosser in “Privacy” (1960) 40 *California Law Review* 383. South Africa appears to be moving towards a doctrine of privacy. See: *O’Keefe v. Argus Printing and Publishing Co. Ltd.*, 1954 (3) S.A. 244—holding that the unauthorised publication of a person’s photograph is capable of being a tort. Cf. *Kidson v. S.A. Associated Newspapers Ltd.*, 1957 (3) S.A. 461.

vested interests of the Press would react strongly, no doubt, against any attempt to introduce legislation, since the freedom of the Press would be threatened.¹⁴ But the time must come when the freedom of the Press is circumscribed so as to recognise a right of privacy for the individual.¹⁵

GERALD DWORKIN.

¹⁴ *Cf.* the Press condemnation of the Tucker Committee Report on Proceedings before Examining Justices (1958) Cmnd. 479.

¹⁵ The Royal Commission on the Press ((1949) Cmd. 7700, paras. 642-643) considered the problem concerning the intrusion of reporters and Press photographers into the privacy of individuals, and stated that it would be extremely difficult to devise legislation which would deal with the mischief effectively and be capable of enforcement. But difficulty must not be an excuse for inactivity!

REVIEWS

ANATOMY OF PRISON. By HUGH J. KLARE. [London: Hutchinson & Co. (Publishers) Ltd. 160 pp. 18s. net.]

THIS book is a popular account of the English prison system as it exists today. It brings out the essentials of the situation; concentrating on those aspects which have been most under discussion by recent students of penology and have been passed upon in the continuous debates on crime and prison reform which are so much a feature of the present times. The author who has for a substantial period been Secretary of the Howard League for Penal Reform, is well qualified both by virtue of his official position and by his own personal and practical studies of the problems under discussion to provide an appreciation of the state of our prisons, which indeed he does in a clear and informative way.

By virtue of his position Mr. Klare is naturally in close touch with the important research work which is now going on into many aspects of penology, and is thus able to bring to the attention of his readers many of the latest ideas and proposals in this exciting field of work. Moreover he has not been content with a merely theoretical or administrative approach to these problems, but has made personal contacts with many of those who have become involved in the meshes of the criminal law whether as its victims or as its administrators. He is thus able to bring to bear a practical understanding—nonetheless sympathetic—of the problems involved, and thus adds very much to the life and reality of his book.

The volume falls into five parts. In the first, "a view of prison," he underlines the concept of prison which is conventionally held in society as a place of punishment and contamination, and shows how the historic prison, a place of evil and sordid life, essentially follows from this concept. He then indicates that there is another concept of prison as a place of reform and even of education which has been gathering adherents. He will study the "anatomy of prison" today in the light of the gradual displacement of the first concept by the second.

The second and longest section of the book is concerned with the communities who live in prisons. Indeed Mr. Klare's approach to the problem is very much coloured by the modern sociological concept of the group; as is underlined by his short bibliography, in which he lists only works which are concerned with this aspect. Nevertheless for the purpose of his analysis of the position of the prisoner he puts his reader into the shoes of a convicted criminal being taken to a local prison in a Black Maria, and then follows out his life for the period of an eighteen-month sentence. However, the group aspect comes out in a shrewd appreciation of "inmate participation" which has been attempted by some progressive governors in recent times. Some prisoners are very cunning and there are always those who are ready and able to play up on such attempts, and mislead the authorities into thinking that they are securing the backing of "prison public opinion," a real force, though difficult to enlist "constructively and fruitfully." One might call this a typical Klare point. The most interesting part of this section however is Mr. Klare's account of the administrative staff of the prisons. The modern prison officer, old warder writ large, is a much changed individual and still changing. The Norwich experiment embodies an attempt to enlist the sympathetic co-operation of these officers in the work of reforming and re-educating the prisoners. This is a constructive idea which has made an instantaneous appeal to the enlightened public, but it is understandable that it

is difficult "to sell" it to the older type of prison officer, and Mr. Klare understandingly indicates how very much team work is necessary right down from the Prison Commissioners through Governors, Assistant Governors, Chief Officers to the men on the ground, if such experiments are to be successful. The work of the prison officer is tedious, frustrating and not without danger. His position has received all too little attention, and Mr. Klare's sympathetic description of it should do much to put it into proper perspective. One important point which he brings out is the quite unsatisfactory scheme of promotion, which must act as a brake on incentive. It is one of the great virtues of this book that an attempt is made, often it must be admitted altogether too cursorily to have much value, to look at the work which is done in the prisons from the point of view of each of the types of administrator engaged in it, whether general or specialist.

The work of most, if not all, of the members of the prison staff is carried on under conditions of considerable strain. An effective discipline is obviously essential—in Mr. Klare's opinion this is normally altogether too authoritarian and militaristic—and this must make it particularly difficult to establish the conditions for curative work. At the same time the more cunning prisoners are always on the watch for weaknesses and mistakes—"all prisoners watch all the staff all the time"—and "attempts are made to exploit these." Moreover in Mr. Klare's view the relationship between the higher officers and the rank and file is not altogether satisfactory in some of the prisons. These matters are obviously of substantial importance and it is valuable to have them brought into the field of discussion.

Part III, which is entitled "Individuals in Jail" is really just a continuation of Part II. It contains further case histories and it is here that Mr. Klare discusses the position of the higher officers and the specialists. A good point is made in relation to the Governor whose qualities of leadership are really the linchpin of the whole business when it is pointed out that in large modern overcrowded jails he is inevitably forced into the role of an administrator, so that the essential personal touch is lost.

In Part IV Mr. Klare discusses a number of "Prison Problems." Of these discipline has already been mentioned. A corollary of this is of course the power complex which inevitably builds up among the staff, in the larger prisons particularly. The converse of this is irresponsibility among the prisoners, which is exactly the opposite of what their re-education requires. It is not easy to see how this can be altogether avoided. Mr. Klare who is a strong advocate of small prisons thinks that in a small community a rather more democratic relationship would be attainable.

Some of the other problems which he discusses are common form in the recent literature but Mr. Klare's views on them are often refreshingly individual. On rewards and punishments in prison he has not much to say; except that the much-debated question of whether flogging should be preserved as a punishment for attacks on warders might solve itself in the small prison which he advocates. The prison officers themselves strongly support it, and at a time when it is so important to enlist their active co-operation in the rehabilitation of prisoners it would be a pity to antagonise them by abolishing a form of punishment which they think essential. There is obviously an incompatibility between the duty on the prison officer of having to flog a prisoner and having to carry out the programme of the Norwich system and this may in the end persuade the officers themselves that they would be better without this form of punishment.

A good deal of attention has recently been focused on the provision of work for prisoners, and the Home Secretary has appointed a committee to make recommendations on the subject. Mr. Klare argues that while this is good we ought not to expect too much from it. He does not think that "forcing a man to work will bring about any positive changes . . . in his

personality," so that "work should not be relied upon to be the main rehabilitative instrument."

In a penetrating section entitled "Love and Isolation" Mr. Klare puts his finger upon one of the main weaknesses of the prison system. A substantial proportion of prisoners are men whose inability to face the realities of existence in the world has led them to commit criminal offences. The "estrangement from reality" of such a person in prison is likely to become even greater, for any "good personal relationships" which he may have are likely to wither in an atmosphere which does not encourage visits or even letter writing. In these respects we are far behind some South American states where wives are allowed to stay with their husbands in prison for short visits, or better still in Sweden where prisoners are allowed to go home on leave.

In his final section Mr. Klare develops his ideas for a "pattern of the future." Starting from a point which has received a good deal of attention in recent years, that the great majority of convicted criminals do not offend again, a figure which he puts at 80 per cent., though this without further analysis may be somewhat misleading, he argues that the crux of the whole matter is the criminal who does offend again, the recidivist who spends much if not most of his life in jail. He suggests that these need a great deal more individual attention which can only be provided in small well-staffed prisons. He therefore proposes that small experimental prisons to take about 150 men should be built to which prisoners should be allocated after careful classification, for he wishes to use the best personalities in the rehabilitation of the less good.

The cost of running such a prison would certainly be high—Mr. Klare envisages a proportion of one staff to every three prisoners. However, if appreciable success were achieved the ultimate saving would obviously more than counterbalance the outlay. The great majority of recidivists must cost the community at least £1,000 each, quite apart from their lost work, while for the worst often the bill must run to £10,000 or more [these are my estimates]. Moreover a substantial number of these recidivists are psychopaths or sufferers from other forms of psychological disorder which are clearly more susceptible of treatment in the small institutions which Mr. Klare advocates. In the result therefore the case which he makes ought not to be rejected on the score of expense.

Many then would find this part of the book the most fruitful and creative. I have of course only attempted to indicate some of the major points which are made in it. Mr. Klare indeed provides a regular blueprint for his ideal small prison which should provide a starting point for much fruitful discussion. It is very much to be hoped that the present Home Secretary who in these matters is a man of vision will see his way to conduct a few experiments on the lines suggested. The overall cost would not be great viewed against the total expenditure on criminal and penal administration and if a measure of success were achieved we should have obtained an important line on the solution of that intractable problem the recidivist.¹

In continuation of the emphasis placed throughout this book on the work of the prison staff Mr. Klare prints in a series of appendices the functions and duties of the various grades of staff together with a short note on their changing functions.

C.

¹ Perhaps not really so intractable as is usually supposed, since Professor Norval Morris has shown that even after preventive detention an appreciable proportion of prisoners manage to keep straight. See his *The Habitual Criminal*.

JOHN AUSTIN ALLE ORIGINI DEL POSITIVISMO GIURIDICO. By ARDUINO AGNELLI. [Torino: Edizioni Giappichelli. 1959. 291 and (indexes) 4 pp. L. 2,200.]

IL CONCETTO DI RIVOLUZIONE NELLA SCIENZA DEL DIRITTO. By MARIO A. CATTANEO. [Milano: Istituto Editoriale Cisalpino. 1960. 123 and (indexes) 4 pp. L. 1,000.]

Dr. Agnelli's volume is No. 7 in a series published by the Institute of Political Sciences of the University of Turin; Dr. Cattaneo's is No. 6 in the second series of the Faculty of Law of the University of Milan, and we note that two other volumes of this series deal with American jurisprudence.

Agnelli offers to the Italian reader a comprehensive survey of John Austin's writings and of Austinian positivism, which he distinguishes clearly from the sociological positivism more familiar to Continental readers. He displays a most exact and detailed knowledge of the text of Austin, of writers of the Austinian school and of modern critics, including linguistic analysts; his index contains over ninety Anglo-American names to some fifty Continental. His presentation of Austin is to us somewhat unfamiliar, giving more attention than is our wont to Austin's view of the area outside the province of jurisprudence strictly so called. He examines Austin's Utilitarianism comparing it with the versions of Paley and Bentham. Austin, he observes, like the Natural Law school, believed in a fundamental principle of right law, although this for him was to be a principle scientifically based on observation and induction. On this wider view some possible criticisms of Austin are dissolved. The Austinian sovereign is no arbitrary tyrant; he is subject to the quite real restraints of the law of God and morality; he has a duty, albeit not a legal duty, to conform to the principle of Utility, and, if he goes too far in disregarding opinion, his commands will cease to be generally obeyed and he will by definition cease to be a sovereign. Perhaps, however, Agnelli does not give sufficient consideration to the Hitlerian type of sovereign who, disregarding the law of God and morality, succeeds in maintaining obedience by a combination of force and propaganda. There are some other points in Austin which do not seem to trouble him so much as they trouble some of our critics, such as the treatment of a command as involving a "wish or desire" in the commander and the difficulty of finding a determinate sovereign person or body in every community. Agnelli considers that Austin was writing for his own time and he stresses the practical and pedagogic aim which Austin set out in the lecture "On the Uses of the Study of Jurisprudence." All in all, this is not merely a valuable book for the Italian readers to whom it is addressed; it is an important critical contribution to the history of jurisprudential thought.

Cattaneo is also well acquainted with modern English writings but he is concerned with a problem which has troubled other countries more than ours. What is a revolution as distinguished from a *coup d'état*, a constitutional change of government, or a "pacific revolution" (where a body which has come to power constitutionally uses its power to make fundamental changes in established institutions)? What exactly is meant by a *de jure* government and a *de facto* government? And, above all, what, for legal theory, is the juridical basis of the law of a country after a revolutionary government has established itself? Cattaneo expounds and criticises the views of many writers of different theoretical schools, idealist and positivist, fascist and Marxist, as well as giving his own answers in which he favours the positivists and the dependence of validity on effectiveness. His view implies that a revolution changes, or at least sets on a new basis, the whole "ordinamento giuridico." The change, of course, may be little more than a notional one; our Revolution of 1688 made no marked change in the substance of English private law or break in the continuity of its development. As indeed

Cattaneo observes, in most revolutions most of the rules of the old system (often, all except constitutional rules) pass unaltered into the new. There can, however, be problems of succession, as when revolutionary Russia declared pre-revolution laws valid "provided they did not conflict with revolutionary consciousness and the sentiment of justice" or when post-war Italian lawyers have had to consider which of the fascist laws are abrogated by incompatibility with the new Constitution. Cattaneo touches on these points but does not go into detail, nor does he discuss the important problems of state succession in international law. Perhaps he will take them up in a later work. His present book within the limits he has set himself is clear and informative.

A. H. C.

PRESTON AND NEWSOM'S RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND. By G. H. NEWSOM. Third edition. [London: Sweet & Maxwell, Ltd. 1960. xxix and 278 pp. (including appendices and index) £3 3s. net.]

THE first and second editions of this work have successively been relied on by practitioners as the best available textbook on a subject which has increased in importance with the lifting of wartime restrictions and with the shift in emphasis to private building. Moreover, with a high proportion of land which could usefully be employed for building subject to a prohibition arising from planning control, land not so sterilised is increasingly prized and private restrictions attached to it become correspondingly more irksome. The last ten years have seen a striking revival of the exercise of the jurisdiction under subsection (1) of section 84 of the Law of Property Act, 1925, to discharge or modify restrictive covenants. This jurisdiction of the Lands Tribunal is dealt with in Chapter 7 of the third edition which has been entirely rewritten and this chapter, particularly when consulted in conjunction with the editor's useful casebook *The Discharge and Modification of Restrictive Covenants*, provides a reliable guide for those called upon to advise on the prospect of success of an application under the subsection.

This jurisdiction can be seen to have been somewhat sparingly exercised and as the editor points out there has been a tendency among practitioners to underestimate the usefulness of the alternative jurisdiction of the High Court under subsection (2) of section 84. The small amount of new authority on the exercise of the court's jurisdiction is dealt with clearly in Chapter 6, which contains useful practical advice on the difficult question of finding the procedure most likely to satisfy the court that the application has been brought to the attention of the persons with a possible interest in the enforcement of the covenants.

In the second edition the editor adopted the system of adding an excursus to certain chapters to give him the opportunity of discussing at length cognate but less essential subjects of particular legal interest. This method has been abandoned in the third edition, with advantage in the opinion of this reviewer. The more important aspects of each excursus have been retained by appropriate alterations to the text with the result that the book is more readable.

In relation to enforcement proceedings the determinant factor of success is most often the right of the plaintiff to enforce the covenants at all. In the second edition the editor expressed in the excursus to Chapter 2 his doubts as to the correctness of the decision in *Newton Abbot Co-operative Society v. Williamson* [1952] Ch. 286, that a plaintiff to whom had been expressly assigned the benefit of a covenant not annexed to any land was entitled to succeed if he could show an intention to benefit his land even though the evidence by which he could show this was outside the language of the instrument containing the original covenant. These doubts were shared by many

practitioners and in 1955 when the second edition was published the general expectation was, as the editor suggested, that the point was likely to be tested before long in the Court of Appeal. This has not happened and with the passage of the years the probability has increased that the view expressed in the *Newton Abbot* case will remain the law. The editor maintains his doubts in the third edition but has wisely excluded the detailed expression of them which was contained in the second edition. The part of Chapter 2 dealing with the plaintiff's interest in the land to be benefited by the covenant has been greatly improved in the third edition, where a proper emphasis is placed on the important decision of *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500.

The editor has rewritten and expanded the part of Chapter 5 in which is discussed the resolution of the question of construction whether a covenant forbids a single act or the continuance of a state of affairs. This difficult subject is not made greatly easier by a consideration of the decided cases and this section of the book provides as helpful a guide as is likely to be found.

JOHN ARNOLD.

THE ADMISSIBILITY OF CONFESSIONS IN CRIMINAL MATTERS. By FRED KAUFMAN. [Toronto: The Carswell Company Limited. 1960. xvi and 153 pp. 45s. net.]

Mr. Kaufman's book is a discussion of Canadian practice and he deals with English cases only in so far as they have binding or persuasive force in Canada. Nevertheless this book holds considerable interest for English readers in two ways. First, it contains a number of Canadian cases illustrating the application of principles with which English lawyers are well familiar. Secondly, and perhaps more important, Canadian decisions have shown up and in part resolved a number of problems which have not arisen in England or, where they have arisen, have not been fully worked out.

What happens if the accused in a preliminary issue to decide whether the confession is voluntary is asked questions regarding the truth of what is contained in the confession? In the leading English authority, *R. v. Hammond* (1941) 28 Cr.App.R. 84, the Court of Criminal Appeal held the accused's admission during cross-examination as to the voluntary making of the confession that the substance of the confession was true was itself admissible evidence of credibility. It was not necessary for them to decide whether it was also evidence of guilt. The trial judge (Cassels J.) had seemed doubtful. Recent Canadian authority has held that, the object of the *voir dire* being to ascertain whether the confession is voluntary and not whether it is true, to hold the accused's answers against him in the subsequent trial is unfair.

Supposing a confession is ruled admissible evidence for the prosecution, is the defence entitled to use it if the prosecution decide not to put it forward in evidence? In Canada the answer is no, this class of evidence is admissible only against the prisoner: *R. v. Adams et al.* (1956) 25 C.R. 80. Can evidence be offered of the accused's testimony given in the course of a previous trial upon the same charge? There is very little authority on this since new trials on the same charge are something of a rarity in English law. The Canadian cases hold that the previous testimony is admissible though the accused elects not to give evidence in the later trial. In effect this is making the accused a compulsory witness in the later trial although he does not go into the witness-box and Mr. Kaufman is very critical of the practice (pp. 129-131).

These are just a few of the problems discussed in this book. Many other matters pertaining to the admissibility of confessions are dealt with. Not the least interesting of these is the discussion of the burden which lies on the prosecution of proving that the confession is voluntary. Mr. Kaufman concludes (p. 20) that it is not sufficient to show "beyond reasonable doubt" that

the confession is voluntary but it must be proved "to the satisfaction of the trial judge" and even then the trial judge has a discretion to exclude it.

The scope of the book is narrow. There is no discussion of the problem of admissibility of facts ascertained as a result of an inadmissible confession and the principle of confirmation by subsequent fact is left largely undiscussed. Important English cases such as *R. v. Gould* (1840) 9 C. & P. 364; *R. v. Garbett* (1847) 1 Den. 236; *R. v. Griffin* (1809) Russ. & Ry. 151, and the Scottish case, *Chalmers v. H.M. Advocate*, 1954 S.L.T. 177, are not discussed.

The problem of whether accusation and failure to deny, or tell-tale denial can amount to a confession or corroboration is incompletely dealt with. The English cases of *Christie v. The King* [1914] A.C. 545 and *R. v. Norton* [1910] 2 K.B. 496 and some Canadian authorities are dealt with but the civil cases of *Bessela v. Stern* (1877) 2 C.P.D. 265 and *Wiedemann v. Walpole* [1891] 2 Q.B. 534 might well have been brought in here and more especially the criminal cases of *R. v. Feigenbaum* [1919] 1 K.B. 431 and *R. v. Keeling* [1942] 1 All E.R. 507. Nevertheless within its rather narrow scope the work is an interesting and a stimulating one and well worth a more than slight perusal by English lawyers. There seems only one drawback. The price of forty-five shillings seems rather excessive for a short monograph.

J. A. ANDREWS.

RACE RELATIONS AND AMERICAN LAW. By JACK GREENBERG.
[New York: Columbia University Press. 1959. viii and 481 pp. 80s. net.]

THE need for a modern treatise on the law of race relations in the U.S.A. has been obvious in recent years. The last book on the legal status of the Negro in U.S.A. was written twenty years ago. In the meantime, there have been tremendous changes in the law, highlighted by the key decisions of the U.S. Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Brown v. Board of Education*, 344 U.S. 483 (1954) and 349 U.S. 294 (1955). The first decision expanded the concept of "state action" subject to the ban of the Fourteenth Amendment against discrimination; it held that courts, as state agencies, were banned under this Amendment from enforcing racial restrictive covenants although these in themselves were valid as "private action." The decisions in the *Brown* case struck down as discriminatory *per se* the pattern, dominant in the South, of providing separate public school facilities for whites and Negroes. These rulings, without formally overruling previous decisions, in effect changed drastically the meaning of the constitutional principles governing the law of race relations.

Race Relations and American Law, by Jack Greenberg, is a book that fills a timely need. It is a comprehensive analysis of the law on white-Negro relations in the United States.¹ In separate chapters it treats the legal status of Negroes in the field of public accommodation and services; interstate travel; elections; earning a living; education; housing and real property; criminal law; domestic relations law and in the armed forces. The wealth of material used is truly imposing. An appendix contains complete citation of state laws and local ordinances relating to the subject. An excellent bibliography adds to the value of the book as a source of reference.

The chapter on education contains an excellent discussion of the problems arising from the School Segregation decisions in 1954 and 1955 and the

¹ Its broad title is not quite borne out by the contents. The laws specifically governing race relations of the Indians are nowhere referred to in the book. It would be fascinating to test the federal laws and regulations setting up and controlling reservations for Indians in the light of the constitutional requirement of equal protection as developed in the case of Negroes, including the prohibition of government-imposed distinctions based on race.

efforts to implement them in the face of strong opposition in some areas. The various legislative and administrative devices developed to delay or thwart desegregation of public schools are described, analysed and criticised with great lucidity.

Mr. Greenberg does more than state what the law is under the constitutional and statutory provisions and the decisions interpreting them. He is fully aware that in the field of race relations the actual situation frequently is a far cry from what it should be under the law. He states repeatedly that law alone neither creates nor ends a certain pattern of conduct. He devotes considerable attention to the extra-legal forces influencing race relations, and he describes the result of the interplay of law and social factors in determining the status of the Negro minority.

The author is an advocate of complete equality of Negroes and whites. This attitude shows through his discussions of court decisions and his legal analysis of situations not yet decided upon. To a large extent, his viewpoint is in line with the trend in decisions of the U.S. Supreme Court. It will be interesting to see whether the courts will go along with Mr. Greenberg's suggestion that *Shelley v. Kraemer* be used as authority requiring courts to decide *any* issue involving racial rights in favour of the Negro party because otherwise the court's action, being state action, would result in racial discrimination. (See example at p. 283.) Throughout the book Mr. Greenberg uses his great argumentative skill to provide a legal basis for what he believes to be a desirable solution of a given problem.

Occasionally, Mr. Greenberg refuses to explain a legal problem, obviously on the ground that in his opinion it is no longer a legal problem. For example, he disposes of the question whether the state has the constitutional power to enact laws against discrimination by simply stating that there is no question about the state having this power (pp. 102, 193); it is not even mentioned that this power derives from the state's police power, which is the power to enact laws for the health, safety and general welfare of the community. Hence, the book provides little guidance to those who like to get information on the constitutional issues involved in various current suits in which the validity of state laws prohibiting discrimination in housing is questioned by the assertion that the state's police power does not include the power to limit a person's freedom to dispose of his real property as he sees fit.

The chapters dealing with discrimination in special fields are preceded by a chapter entitled "A legal overview." This reviewer agrees that an introduction summarising the historical development and setting forth the basic legal doctrine governing the law of discrimination is called for. However, he does not find the treatment of the matter in that chapter fully satisfactory. The historical sketch should have started with the adoption of the Fourteenth Amendment in 1868 rather than with the decision of 1896 establishing the separate but equal doctrine. After all, this doctrine relates to just one aspect of the principle of equal protection of the law which the Fourteenth Amendment established as a limitation upon the states. The chapter might have explained the federal system and the bearing it has on the law governing race relations. It might have dealt with the relationship of the Fifth Amendment, banning, through its due process clause, discrimination by federal authorities, to the equal protection clause of the Fourteenth Amendment, addressed to the states. It might have also explained the two meanings of due process guaranteed by the Fifth and the Fourteenth Amendments against action by the federal and state governments; the book refers sometimes to its substantive (*e.g.*, pp. 277, 289), sometimes to its procedural, meaning (*e.g.*, p. 314) without indicating which is meant.

While some of the chapters dealing with specific problems contain satisfactory introductions setting forth the basic legal problems—the chapters on election and interstate commerce are outstanding in this respect—this cannot be said of the chapter on discrimination in employment where, therefore, the

lack of an adequate introductory chapter may create difficulties in the minds of persons not fully familiar with the American constitutional system.

The foregoing remarks should not detract from the conclusion that this is a publication of outstanding importance and value. It is a scholarly, fully documented treatise on the law on Negro-white relations as it stands today, written by a man who has mastered the subject. It should be indispensable to anybody who, for theoretical or practical reasons, wants to deepen his understanding of the legal aspects of race relations in the United States.

PAUL HARTMAN.

LEGAL INSTITUTIONS TODAY AND TOMORROW. The Centennial Conference Volume of the Columbia Law School. Edited by MONRAD G. PAULSEN [Columbia University Press. London: Oxford University Press. 1960. xiv and 339 and (index) 6 pp. 48s. net.]

THE conference marking the Centennial of the Columbia Law School held in New York in 1958 brought together, we are told in the introduction to this well set-up volume, thirty leading judges, law teachers, practising lawyers, and legislators to discuss the future of American legal institutions. The book is composed of the main papers of the conference and commentaries on them by other speakers. Lord Denning, the chief English guest speaker, surveys old ground in a perceptive and readable way in a short paper entitled "Legal Institutions in England Today and Tomorrow," and Professor Graveson and Mr. D. W. Bowett supply comments. There are seven other substantial papers, with accompanying commentaries, concerned with the operation of legal institutions rather than with developments in specific areas of the law. For the English reader there is much to be learned, directly and by implication, of the present state of American legal institutions from these contributions.

A great deal of attention is given to the legislative process, which the Columbia Law School has treated as meriting great attention and respect, much more so than have law schools generally (p. 68). The School's Legislative Drafting Research Fund has apparently forwarded improved legislative drafting and left its mark on the form of the law. The long paper on "The Administrative Process" by Mr. Warner W. Gardner, who has had extensive experience of its workings, is one of the most noteworthy contributions. Another contributor, referring to administrative agencies engaged in adjudication, shrewdly observes (p. 42n.) that for the most part administrative judges have not "shown themselves to be adept or persuasive expositors of principle" and that "perhaps for this reason, their expositions do not enjoy a prestige with the public comparable to that of the courts." The Cardozo Professor of Jurisprudence remarks (p. 197) that "there are sobering overtones for the law schools and for the organised bar" in the thought that "the bar is the main source from which the state recruits its official power-holders: three-fourths of its elected legislators, the lion's share of its top administrators, all of its judges." Yet, by contrast to the position in England where the state is not so fond of lawyers, the law schools keep to the tradition of rigorous professional and vocational training.

It might be a mistake to attribute to this training the turgid style which marks so many of these pages of patient thought and copious utterance. There are many good things to be found in them but the writing almost suggests that the author, painfully groping, tentatively thinking, must have said them, stumbled upon them, by chance. Perhaps it is the English reader's fault in not being able quickly to adapt to the underlying concepts and thought processes back of incompletely co-ordinated statutory provisions and decisional law and their exponents, and to remember that "although his feet are in the

muddy road of life, he must keep his eyes upon the stars" (p. 207) and "never dream 'though right were worsted, wrong would triumph'" (p. 319). But how little French influence has survived from the days of the Fathers of the American Constitution and legal system in the thudding, almost Teutonic, periods of American legal writing, how far removed from Kent and Story the remorseless, unrhymic beat of these sentences with some of the involutions but none of the grace of a Henry James.

W. H. D. WINDER.

FREMDE EINFLÜSSE IM MODERNEN JAPANISCHEN RECHT. By WILHELM RÖHL. Vol. IV of the *Schriften des Instituts für Asienkunde in Hamburg*. [Alfred Metzner Verlag, Frankfurt a.M. and Berlin. 1959. 72 pp. DM.8.80.]

THIS is an extraordinarily interesting and valuable little work. The author, a former judge of the Hamburg District Court, is now the head of the German Cultural Institute at Tokyo. He writes as an experienced practitioner with a sound knowledge of contemporary conditions in Japan and of German and Japanese legal literature and with a good, though merely theoretical knowledge of English and American law. The result of his investigations is of importance for anybody wishing to understand the present-day overall position of the Japanese legal system. It also throws significant light on the relative strength and weakness of the common law and the civil law systems and on the extent to which occupation policy may succeed in altering the basic rules of law of an occupied country.

Japan has for long been converted to the modern civil law system. After a comparatively short spell of French influence it had largely adopted the rules of modern German law. In fact, its Code of Civil Procedure had been virtually a translation of the German Code and its Civil Code had been very strongly influenced by the German Civil Code, except in the realm of family law in which native views and conceptions, securing a predominant position to the head of the "house," had continued to prevail until very recently. The defeat in the Second World War and the subsequent occupation by U.S. troops brought to tendencies favouring the common law—which had had adherents among Japanese scholars long before the Second World War—a sudden fresh impetus, notwithstanding the fact that the occupation authorities wisely refrained from imposing their will by compulsion and relied very largely on methods of persuasion by way of discussion and instruction.

The author traces most lucidly and attractively the various successes and defeats suffered by common law tendencies in Japan since 1945. He shows the extent to which at least some of the defeats were due to technical oversights and the failure to see that any partial reform that takes insufficient account of the remaining bits and pieces must necessarily result in fresh difficulties, which as such are not experienced under either the new or the old system. On the whole, Japanese experience seems to confirm the view that any military occupation in the long run is a losing game.

The author avoids the error into which many contemporary comparatists have fallen and never attaches too much importance to rules of substantive and too little to rules of procedural law. But one feels that here and there he is inclined to take a somewhat too pessimistic view of the effect of English rules on the administration of justice. Thus, his suggestion that the English rules of evidence were, if strictly carried into effect, "undeniably apt to turn the court into a judicial slot machine" (at p. 61) will be noticed with some amusement by anyone with even slight experience of English procedure.

E. J. COHN.

MODERN FORMS OF GOVERNMENT. By MICHAEL STEWART, M.A., M.P.,
[London: George Allen & Unwin, Ltd. 1959. 284 pp.
2ls. net.]

MR. Stewart, whose *British Approach to Politics* has deservedly earned a high reputation, has set himself the more difficult task of writing a short textbook on comparative government. In the words of the blurb, he has attempted to describe "both the formal constitution and the actual working of the government in some twenty countries in all parts of the world: the United Kingdom and the older and newer countries of the Commonwealth; the U.S.A. and the countries of Western Europe; the U.S.S.R. and the smaller Communist countries." It is probably fair to assume that the book is addressed primarily to adult educational groups and to the sixth forms of schools. In many ways the book meets the needs of such readers admirably. It is lucidly and attractively written. The author has an aptitude for making concise and sensible generalisations about issues that are too often clouded by pomposity and vagueness. He has a keen perception of what really counts in politics; and in his comments on the ultimate ends of government he is generally on the side of the angels. He sets the constitutions that he discusses in their historical and ideological backgrounds, and his chapters on Marxist political philosophy and on the elements of similarity to be found in Commonwealth constitutions are very helpful. The chapters on Italy and the Scandinavian countries include material that is not easily discoverable elsewhere.

However, the first requirement of a book on comparative government is that it should be accurate. And it is in this respect that Mr. Stewart fails to come up even to modest expectations. An incomplete exposition of the Parliament Acts may be attributable to pressure on space; a statement that there are thirty-four judges of the High Court of England is a minor error; but it is strange that a former Minister should make the flat assertion that delegated legislation "must" be laid before both Houses of Parliament subject to the power of annulment, and few readers who are not lawyers will be able to interpret correctly the author's account of appeals from the superior courts. If it is surprising that the author treats Ceylon as a republic, it is astonishing that he refers to Malaya as part of the "subject Empire." He is apparently unaware of the South African legislation of 1956 relating to the entrenched sections of the Constitution and the Cape coloured franchise, and he writes on the assumption that appeals still lie from the Union to the Judicial Committee of the Privy Council. He is wrong in thinking that the Constitution of India does not confer residual legislative power on the Centre. In dealing with Switzerland he does not make it clear that the courts have jurisdiction to review the validity of cantonal but not of federal legislation. Nor does he ever explain the fundamental distinguishing characteristic of a federal constitution—the allocation of exclusive fields of competence to central and regional authorities—although he uses the terms "federal" and "unitary" many times.

So numerous are the inaccuracies that one hesitates to recommend this book to university students. It could have been a good book—and can be, for it is likely to go into further editions, and the author will then have the opportunity to revise the text thoroughly. The inclusion of a bibliography would be helpful, if only to acquaint the reader with the sources on which the author has thought fit to rely for his factual information.

S. A. DE SMITH.

THE GROWTH OF INTERNATIONALISM IN ENGLISH PRIVATE INTERNATIONAL LAW. By O. KAHN-FREUND. [Jerusalem: at the Magnes Press. 1960. 90 pp.]

THESE are the Lionel Cohen Lectures for 1960. They are concerned as their title indicates with what Professor Kahn-Freund regards as a significant

reorientation of the attitude of the English courts when handling problems of conflict of laws. Nobody could be better fitted than the lecturer to assess the importance and extent of this development, with his continental training, his English preoccupation with this branch of the law, and his extensive contacts and experiences in the U.S.A., where these problems loom so large. The result of the study which he has made of his subject is an unusually interesting course of lectures which cannot fail to be encouraging to those of us who have often felt embarrassed by the rather insular habits of recent generations of English judges.

Professor Kahn-Freund devotes the earlier pages of his first lecture to a historical survey of the growth of private international law in England which proceeded on what he calls "nationalist" lines, but was untroubled by "the great struggle between the nationalists and the internationalists" which took place in Europe. He shows however that there was always present a vein of liberalism which prevented the adoption of such rules of extreme nationalism as that laid down in the U.S. in *Hilton v. Guyot*, and he then describes in some detail how after the First World War, which seems to have acted as a kind of catalyst, this grew in importance till it seems that now it dominates the position.

In the later part of the first lecture he works out his thesis in some detail in connection with family law, particularly the recognition of divorce decrees granted by foreign courts, though as Professor Kahn-Freund makes clear the foundation for the work of the courts has been an increasingly liberal statutory policy in law making. Naturally in handling this matter he makes extensive use of the judgments in *Travers v. Holley*.

In his second lecture he deals with conflicts in connection with international contracts, which means in practice commercial relationships. In this most valuable and constructive analysis he throws clear light on the difficult technical problems involved in such cases as *The Toni* and the *Vita Food Products* case and the difficulties involved for English courts by international maritime legislation like the Carriage of Goods by Sea Act, 1924. Even more significant is his handling of the line of cases on illegality running from *Ralli Brothers* to the *Sethia* case, during the course of which he demonstrates authoritatively that the latter decision which has of course been much criticised is within the developing principle of the doctrine of public policy as adopted and applied by the British courts in furtherance of international friendship.

In the final lecture Professor Kahn-Freund returns to the field of family law to describe and discuss the working out by our courts of a policy in relation to the adoption of children. With accelerating movement across national frontiers as a result of military dispositions, and growing international trade and industry these problems have acquired a new importance and English judges moving into an area where until recently there were not even municipal rules have not found it easy to get their bearings when called upon to face problems arising out of foreign adoptions. However on the whole Professor Kahn-Freund is satisfied that progress has been made. "Parliament is beginning to use British Institutions for the purpose of preparing the ground for foreign adoptions, and the judges are beginning to recognise them." This he concludes is "symptomatic" of the growth of a "desire for international co-operation . . . in England, and especially among the English lawyers."

C.

TREATY-MAKING POWER. By HANS BLIX, PH.D., LL.D. [London: Stevens & Sons, Ltd. New York: Frederick A. Praeger. 414 pp. £4 4s. net.]

It is one of the paradoxes of international law that, although treaties are universally accepted as one of the most important sources of that law,

confusion reigns in regard to the law of treaties itself. The International Law Commission has had the subject on its agenda since its inception, but has made slow progress with it. It is also a matter for subtle speculation whether the law of treaties—assuming agreement can be reached on its content—should itself be enacted in a treaty or in some other form.

Mr. Blix, a Swedish writer already known for a valuable article on "The Requirement of Ratification" (*British Year Book of International Law*, 30 (1953), p. 352), is to be congratulated upon having produced a scholarly piece of research, albeit in a narrow field. Conceding that the law of treaties has three main branches—conclusion, interpretation and termination of treaties—Mr. Blix has concentrated on problems connected with the conclusion of treaties. "In order," he says in his Preface, "that a treaty may be validly concluded on behalf of a State, two requirements of fundamental importance must be met. The first is that expressions of consent have occurred; the second, that these expressions shall emanate from persons who are competent to give them." It is with the second of these requirements that this book is concerned. Granted that considerations of space compelled the author thus to limit his research, it nevertheless remains true that there are certain difficulties in thus distinguishing between competence to give expressions of consent and the manner in which those expressions are given. Even the requirement on which the author concentrates (competence to give expressions of consent) is found to raise two distinct but interrelated problems. The first—to quote the author—is that of "identifying the competent treaty-making organ," and the second is "that of the conditions under which the expression of consent given to a treaty may be imputed to the treaty-making organ whose agent the individual purports to be." The second problem is one on which so far very little work has been done. For that reason, although this problem is inherently less substantial than the other one, Mr. Blix's treatment of it is especially welcome.

One interesting point which emerges from the author's study of this question is the lack of clarity in regard to the international status of Foreign Ministers, and still more of course in regard to the treaty-making capacity of other Ministers. International law in this respect still thinks too much in terms of Heads of State and diplomatic agents; it has not sufficiently caught up with the fact that today these are not the only personalities through whom international agreements are made. In a careful study of the famous Ihlen declaration Mr. Blix points out that the remarks of the Permanent Court of International Justice in regard to that declaration have been misunderstood, and the significance of those remarks either grossly exaggerated or unduly minimised. His view is that "the decision is authority for the proposition that by his position a foreign minister is competent under international law to bind his State by agreements . . . but that the Court took no position in the controversy over the international relevance of constitutional provisions requiring legislative assent, or countersignature or forbidding the conclusion of certain types of treaties" (p. 38). Moreover, the Foreign Minister's competence in this respect is limited, according to Mr. Blix, to what Fairman has called "matters generally settled by arrangement between foreign secretary and diplomatic agent."

The question of the competence of diplomats to sign agreements is likewise discussed exhaustively, particularly in the light of the Kauffmann incident of 1941, in which the Danish Minister in Washington purported to sign, without any authorisation from his own Government, an agreement with the Government of the United States relating to the defence of Greenland. The author feels unable to point with certainty to any particular rule, although he refers to "a tendency . . . to see in the position of accredited diplomats a presumption, which may be relied upon unless there is any evidence to the contrary at the time the treaty is concluded, of competence under international law to express irrevocable consent to treaties" (p. 64). Nevertheless he advises

governments not to rely too much upon any such presumption, but rather to request evidence of the authority of any envoy with whom they propose to conclude a treaty.

A valuable feature of this section of the work consists in a number of diplomatic incidents brought to light by the author and not discussed to any great extent in the standard textbooks. One such incident took place in 1879 when the Chinese Minister Plenipotentiary in Russia, Chung How, signed a treaty that was unfavourable to his country. It has been suggested that the Minister was simply anxious to get back to China as soon as possible and covered himself by making the treaty subject to ratification. Chung How was sentenced to "decapitation after incarceration"; the Russians protested, referring to "the international practice that no government has the right to punish an Envoy for the failure of negotiations"; and Queen Victoria pleaded, not in vain, that Chung How's life be spared.

The methodical study of incidents in the field of treaty-making is likewise one of the features of the second part of the book in which the author discusses the general question of the competence to conclude treaties on behalf of states. This is done in two sections: first where there is no applicable regulation of the matter under municipal law; and secondly, where the matter is clearly regulated under municipal law. The first type of case is more common than might be supposed. It is especially likely to occur at this moment, for instance, when a number of states are achieving independence at short notice. This circumstance can perhaps be invoked to justify the author's otherwise dubious habit of relying for authority largely on incidents involving Latin American countries in the nineteenth century. The author has also included a particularly valuable chapter on the treaty-making competence of governments in exile. That the value of this section of the work lies principally in the discussion of incidents, however, is illustrated by the fact that, despite all his research, the author feels unable to state a rule in any more positive terms than the following: "Under international law, treaty obligations may be assumed on behalf of a State by authorities possessing apparent ability to secure the fulfilment of such obligations" (p. 218).

The situation which arises if an organ concludes under international law a treaty which it lacks competence to conclude under constitutional law is of course one which has been repeatedly discussed. Even here, however, the author, despite an exhaustive examination of the problem, feels unable to put forward a firm rule. He inclines to the view that in this situation too the criterion of "apparent ability" to secure the fulfilment of international obligations has a dominant role to play. He sums up the position as follows: "The bodies having apparent ability, in general, to secure the performance of treaty obligations are attributed plenary competence under international law to pledge the State. There is no need to weigh in each case whether the authority in question is able to ensure performance of the obligations embodied in that particular compact" (p. 393).

Mr. Blix's conclusions are admittedly somewhat uncertain and tentative. This arises, however, partly because he has not attempted to cover the whole of the law of treaties but has (as explained above) concentrated on a relatively narrow aspect. Also, he has not attempted to establish any particular thesis of his own so much as to discover a rule from the practice of states, and that practice is itself uncertain. This very uncertainty may, however, lead to the adoption of a clear rule of international law since, as the author puts it, "it is the extremely uncertain position in practically all States of constitutional limitations affecting the treaty-making power that has led governments to disregard the various limitations upon actual ability of treaty-making organs, evidence of which may be found in constitutional provisions" (p. 395).

The work is characterised throughout by meticulous scholarship and constitutes a valuable addition to the literature on the law of treaties.

D. H. N. JOHNSON.

THE TIME FACTOR IN THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE. By SHABTAI ROSENNE. [Leyden: Sythoff. 1960. 87 pp. Fls.9.25.]

IN his major work on *The International Court of Justice* Mr. Rosenne dealt with the Court's jurisdiction *ratione temporis* in a single paragraph consisting of a mere dozen lines. He has now found it possible to deal with the problem more fully in the form of a short monograph.

Mr. Rosenne points out that the problem of temporal limits upon the jurisdiction of the World Court has two distinct aspects: one relating to the entry into force of declarations accepting the jurisdiction of the Court, and the other concerning temporal conditions introduced into the material character of the acceptance of jurisdiction. This distinction has its effect on the problem of reciprocity between the parties to an action before the Court. Although states appear before the Court on a basis of equality and may invoke each other's declarations accepting the "compulsory" jurisdiction of the Court in order to take advantage of any reservations they may contain, this cannot apply to the date of entry into force. Here, mutuality and not reciprocity prevails (p. 50). Jurisdiction will exist so long as both states have effectively accepted it, that is to say, so long as both declarations are in force. Where substantive time clauses are concerned, however, true reciprocity prevails, and the jurisdiction will exist only in accordance with the narrower of the declarations and the later date from which issues must arise if they are to be justiciable (p. 53).

In his book, Mr. Rosenne drew attention to the essentially political character of the decision to submit to jurisdiction.¹ Here, too, the Legal Adviser to the Israeli Foreign Ministry shows his realism. He points out that any "reference to the Court in the guise of a legal dispute—that is the depoliticisation of the dispute implied in the invocation of the judicial process—always occurs in the context of a certain historical development" (p. 46). He emphasises that this is true of temporal clauses in the field of jurisdiction and in the Court's attitude to them, and finds his evidence for this "in the proper distinction drawn by [the Court] between the facts at the origin of the dispute *conceived as a legal notion* . . . and the underlying political facts, *i.e.*, the historical origins, which that dispute, that legal dispute, presupposes" (p. 47, italics in original).

A temporal clause that has become particularly popular since the Second World War relates to the exception from the compulsory jurisdiction of the World Court of issues arising from that War. The most recent reservations of this character, of which those of Israel, France and the United Kingdom are good examples, show that the reservation is now being widened in order to apply to any form of hostilities. They are, therefore, in accordance with the tendency to construe both *de facto* and *de jure* wars as having virtually the same legal consequences (see the reviewer's "Armed Conflict, War and Self-Defence," 6 *Archiv des Völkerrechts*, 1957, p. 387, at p. 438). The learned author explains that "these declarations go hand in hand with the tendency of modern international law to avoid a dichotomy between war in the formal sense and war in the pragmatic sense . . . [, and] this reflects the pragmatic approach of 'threat or use of force' of Article 2, paragraph 4, of the Charter" (p. 66, note 1).

Mr. Rosenne examines the jurisprudence of the Court, and of its predecessor, in some detail, and warns how easily the significance of the temporal clause may be exaggerated. Temporal reservations to the Court's jurisdiction are frequently put forward, but never in isolation. They always constitute a mere part of the objections lodged by a state against the exercise of the Court's jurisdiction (p. 72). In fact, on the basis of Mr.

¹ See review (1958) 21 M.L.R., p. 573.

Rosenne's study, it would appear "that jurisdiction *ratione temporis* does not exist as an independent concept of the law governing the jurisdiction and competence of the Court. It is a dependent concept, giving rise to a particular problem of determining the nature and effect of that dependency on the personal or the material jurisdiction of the Court, as the case may be" (p. 16).

L. C. GREEN.

THE CASE LAW OF THE INTERNATIONAL COURT. By E. HAMBRO.
Vol. II, 1952-1958. [Leyden: Sythoff. 1960. vii and 376 pp.
Fls.32.50.]

IN the eight years that have elapsed since the publication of the first volume of Professor Hambro's repertoire of the judgments, advisory opinions and orders of the International Court of Justice, the World Court has been called upon to deliver judgments on a variety of issues. Among these are the *Ambatielos Case*, the *Anglo-Iranian Oil Co.* judgment, the dispute on the *Rights of United States Nationals in Morocco*, the *Nottebohm Case*, the advisory opinions on the awards of the Administrative Tribunals of the United Nations and the International Labour Organisation, as well as two on South-West Africa, and a number of judgments declining to exercise compulsory jurisdiction.

Despite the number of cases with which the Court has been concerned during these years, the number of pages in the *International Court of Justice Reports* is approximately some 400 pages less than were digested by the then Registrar of the Court in his first volume ((1953) 16 M.L.R. 409). This is not to imply that the members of the Court have been less anxious to express themselves than they were in the early years, although it is true that Judge Krylov's successors as representatives of Soviet law are less forthcoming than he was. Other judges have been as willing as ever to deliver their views by way of separate or dissenting opinions. The Court, however, has been seised of less vital issues than, for example, the *Anglo-Norwegian* or *Corfu Channel Cases*, and has often found it possible to deny its jurisdiction somewhat briefly.

For his second volume, Professor Hambro has, wisely, used the same divisions of material as he did in the earlier compilation. He has, however, taken the opportunity to break down the material in greater detail than he did before, using far more subdivisions than previously. In order to facilitate the use of the two volumes, he has included in the second references to the relevant pages of the first, in which these sub-headings were not used. As with the earlier volume, a most useful bibliography of some 900 items dealing with the work of the Court is appended.

In his review of the first volume, the writer expressed the hope "that some day Dr. Hambro will find the time to provide a companion *Repertoire* of the dissenting and separate judgments and opinions, the significance of which he has already indicated in his Introduction." The significance of these individual opinions is again emphasised in the Introduction to the second volume. In fact, Professor Hambro points out that "nothing has indicated the need to change the basic plan of the book except an increasing use made by the judges of their right to write individual and dissenting opinions."

While the learned author was the Registrar of the Court one could understand his natural reticence in attempting to discriminate among the individual members of the Court. Now that he is no longer officially connected with the Court, however, there is not the same need for discretion. Professor Hambro emphasises, rightly, that it is the majority opinions that constitute the *jurisprudence* of the Court. Nevertheless, there are a number of joint concurring opinions which have made telling points, for example, that concerning the

British attempt unilaterally to bring Albania to the Court in the *Corfu Channel Case*; while among the joint dissenting opinions there are the comments on the right to veto an application for membership and on the succession of the International Court of Justice to its predecessor delivered in connection with the judgment on the *Aerial Incident* between Israel and Bulgaria. Among the individual opinions, too, there is much of importance on Latin-American law in the *Asylum Case*, on jurisdiction in the *Norwegian Loans Case*, on the ratification of treaties in United Kingdom practice in the *Ambatielos Case*, and on public policy in the *Guardianship of an Infant Case*.

Perhaps, one day, Professor Hambro will overcome his inhibitions and put us even more in his debt than he has already done with these two volumes.

L. C. GREEN.

HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS. By C. WILFRED JENKS. [London: Stevens & Sons, Ltd. New York: Frederick A. Praeger, Inc. 1960. xvi and 159 pp. 25s. net.]

THIS is a welcome introduction by the Assistant Director-General of the International Labour Office to the work of the International Labour Organisation in giving practical expression to the ideals set forth in the Universal Declaration of Human Rights. Dr. Jenks sets out by showing the international importance of establishing fundamental human rights. He points out that "Historically, logically, and in the practical context of our day by day political, economic and social problems, human rights and international labour standards become complementary to each other in an interdependent and increasingly industrialised world community" and proceeds, having explained briefly the constitution and procedures of the International Labour Organisation, to examine the various practical measures which the Organisation has introduced. Thus the Forced Labour Conventions, the Conventions on Freedom of Association and the 1958 Discrimination Convention are examined, their achievements and limitations outlined. Dr. Jenks points out the particular constitutional problems which are often faced by federal states in acceding to conventions of this type and shows too the usefulness of the recommendation, in cases where a convention is unacceptable, in fostering progressive world opinion and standards. He also outlines the efforts of the International Labour Organisation to achieve equal remuneration for men and women workers, to secure a measure of social security, to promote efficiency in the employment of labour and to improve the actual conditions of work. But all these measures, the author emphasises, are only part of the wider aim of establishing international recognition of the whole body of fundamental human rights and liberties foremost among which are freedom of expression and freedom from arbitrary arrest; and he concludes by suggesting that the methods successfully employed by the International Labour Organisation might also yield useful results in the field of civil liberties generally where little has yet been achieved. This is a stimulating book which will be welcomed by the general reader and student alike.

P. B. KEENAN.

DAS DEUTSCHE SEERECHT. By GEORGE SCHAPS AND HANS JÜRGEN ABRAHAM, Vol. I. [Berlin: Walter De Gruyter & Co. 1959. xx and 1397 pp. DM. 298.]

"COMMENTARY AND MATERIALS" is the sub-title of this monumental work on German shipping law, which will eventually consist of three volumes. In this

first volume, which covers both seagoing and inland shipping, except marine insurance, the laws are annotated, and the materials include international conventions and trade and shipping agreements to which West Germany is a party, and also port regulations and forms in common use.

"German Shipping Law," the original title of the work, first published in 1906, has been retained, although, as already implied, only the law of the West German Federal Republic is covered. The laws of East Germany are mentioned, and the mention is accompanied by the warning that it was impossible to establish with certainty which laws enacted before Germany's division in 1945 still apply in the eastern part of the country.

When all three volumes are published this will probably be one of the most comprehensive works on shipping law in the world, for it will cover international and German public and private law, and it will also give a lead to those in search of corresponding provisions in other laws. Even this first volume, devoted to international and such German, mostly federal, laws as those relating to nationality, flags, registration and safety, contains comprehensive lists, and sometimes fairly detailed descriptions, of foreign laws, ranging from the Soviet Union, China and the Latin-American countries to landlocked Switzerland and the Vatican. References to foreign literature complete the picture. The second volume will contain the fourth book of the German Commercial Code of 1897, which regulates the core of the subject, the contract of affreightment, and the third volume will deal with the industrial law applicable to shipping and with ancillary matters.

The publishers deserve thanks for their enterprise and Professor Abraham, the editor, well known for example as the author of a concise textbook on shipping law, the congratulations of colleagues in the widest sense on having concluded one-third of his great effort. The previous edition appeared partly in 1921 and partly in 1929, so that the new editor had to cover over thirty years of legislative, judicial and treaty-making work. In this first volume he has maintained the high tradition of the late author, a Hamburg judge eventually raised to the Supreme Court bench, and the late editors of the second edition.

The work is of course intended in the first place for German practitioners and academic lawyers. But enough has been said to show that non-German lawyers will derive great benefit from the use of this pathfinder to the world's shipping laws. On details of German law the work aims at completeness, an ideal to be achieved only by innumerable references to case law. In common with all similar books therefore this, too, can be used to the best advantage only in a library containing at any rate a fair selection of German law reports.

Turning the pages the following were among the many points of interest: The section dealing with international rivers shows that the Elbe River is not at present covered by a convention, so that craft wishing to cross the boundary between the two Germanies require special permission. Ships passing through the Kiel Canal can only claim compensation for damage according to the negligence rule in the sections on torts of the German Civil Code of 1900. The statute ratifying the 1954 International Convention for the Prevention of Pollution of Sea by Oil required the amendment of Article 13 of the Federal Constitution, the so-called Basic Law, which guarantees the freedom from search, to authorise port authorities to inspect the oil discharge records of ships. As after the 1914-18 War, legislation was again enacted to promote the revival of West German shipping, and this included not only public loans but also the authorising of mortgages on ships in the course of construction.

A section of great interest is the comparative survey covering the law relating to nationality and the right to fly the national flag. It reveals the great variety of relevant provisions; those enacted in neutral Switzerland are most restrictive, for the Swiss flag may only be flown by ships owned by companies all of whose shareholders are Swiss nationals resident in Switzerland. The section on the immunity of government vessels brings to mind that Britain has not yet ratified the Brussels Convention of 1926.

Commercial lawyers will look forward to the second volume. The present volume naturally produces few problems of special interest to them. They will however be attracted by the sections of the Code of Civil Procedure relating to the arrest of ships and to those sections of the registration law relating to the transfer of property in ships. Contrary to English law, for example, property in a seagoing ship passes by agreement, although property in chattels generally, including inland vessels, also requires actual or symbolical transfer of the chattel. The reason for this extreme informality is obscure; that given by the authority referred to by the editor fails to convince. Registration, necessary to establish the right to fly the flag, is declaratory. This is one of the many points where the laws relating to seagoing and inland vessels diverge, and the test of distinction between the two types of vessel has given rise to intricate arguments recorded in this volume.

O. C. GILES.

THE BRITISH JOURNAL OF CRIMINOLOGY, Vol. I, No. 1, July 1960.
[Published for the Institute for the Study and Treatment of
Delinquency by Stevens & Sons, Ltd.: London. Quarterly.
12s. 6d. Annual Subscription £2 2s.]

We are very glad to welcome the first number of the old *British Journal of Delinquency*, under its new name. Since we noticed its first appearance in 1950 (14 M.L.R. 116) it has gone from strength to strength, and has indeed achieved an international reputation. The editors discuss in the opening pages the reasons which have led to the change of name. The main one is that while the word "delinquency" has come more and more to mean juvenile offences the word "criminology" has been shedding its implication of being principally concerned with "police science" which was always rather an American use of the term. The decision is a wise one, and we hope that the journal will continue to grow in authority and usefulness. Our own publishers, Stevens and Sons, Limited, have now taken over the publishing of this journal.

In this number we have an authoritative article by the senior psychologist at Brixton Prison (Dr. P. de Berker) on "State of Mind" Reports for sentencing tribunals, one of the more far-seeing innovations of the Criminal Justice Act, 1948. Dr. de Berker's opposite number at Wandsworth, Mr. R. S. Taylor, discusses the characteristics of the habitual criminal, and Dr. Pollock, the prison doctor at Portland, is in the unusual position of being able to provide a detailed history of a case of neurotic exhibitionism. At this point the reader will begin to wonder whether the medical side is to fill the whole number, but Mr. D. M. Lowson who is something of a sociologist as well as Assistant Governor of a Borstal Institution comes to the rescue with a valuable study of "Delinquency in Industrial Areas."

As usual there is a Notes Section, this time devoted to overseas topics, and the Current Survey on Research and Methodology is carried forward from the last number of the *British Journal of Delinquency*.

C.

CORRIGENDUM

The writer of the letter published at pp. 726-727 of Vol. 23 of the *Review* was Mr. Robert A. Samek, Senior Lecturer in Law in the University of Melbourne.